United States Court of Appeals

for the Second Circuit

JOINT APPENDIX

76-7217

ORIGINAL

In The

United States Court of Appeals

For The Second Circuit

COMMERCE TANKERS CORPORATION,

Defendant-Counterclaimant-Appellant,

and

VANTAGE STEAMSHIP CORPORATION,

Intervening Defendant-Appellant,

vs.

NATIONAL MARITIME UNION OF AMERICA, AFL-CIO,

Plaintiff-Appellee.

(Cont'd)

JOINT APPENDIX

Volume I, pp. 1a-300a

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UNITED STATES COURT OF APPEALS
FILED
JUL 23 1976
DANIEL FUSARO, CLERK
SECOND CIRCUIT

(9722)

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VANTAGE STEAMSHIP CORPORATION,

Plaintiff-Appellant,

vs.

NATIONAL MARITIME UNION OF AMERICA, AFL-CIO,

Defendant-Appellee.

PAGINATION AS IN ORIGINAL COPY

TABLE OF CONTENTS

	Page
Relevant Docket Entries (71 Civ. 582)	A
Relevant Docket Entries (72 Civ. 4619) . . .	F
Relevant Docket Entries (71-1460) . . .	H
Complaint (71 Civ. 582) (Filed February 9, 1971)	1a
Exhibit 2 — Arbitration Opinion & Award Annexed to Foregoing Complaint . . .	3a
NMU's Order to Show Cause (71 Civ. 582) (Filed February 9, 1971)	5a
Stipulation Adjoining Motion (Filed February 11, 1971) (71 Civ. 582)	7a
Vantage's Order to Show Cause -- Motion to Intervene (71 Civ. 582) (Filed February 16, 1971)	8a
Affidavit of P.T. Corletta in Support of Foregoing Motion to Intervene (71 Civ. 582)	10a
Plaintiff's Undertaking on Injunction (71 Civ. 582) (Filed February 17, 1971) . . .	17a
Affidavit of D. David Cohen in Support of Foregoing Vantage Motion (71 Civ. 582) .	19a
Exhibits Annexed to Foregoing Affidavit:	
1 — Affidavit of Joseph Curran	31a

Contents

	Page
2 — Affidavit of John J. Collins	41a
3 — Affidavit of M.E. Lundfelt	47a
Decision of Wyatt, U.S.D.J. on February 19, 1971 (71 Civ. 582) (Filed February 19, 1971)	55a
Vantage Undertaking on February 22, 1971 (71 Civ. 582) (Filed February 22, 1971) . .	58a
Defendant's Answer (Filed February 25, 1971)	60a
Affidavit of Ned R. Phillips in Support of Plaintiff's Motion For Preliminary Injunction (71 Civ. 582)	64a
Exhibits Annexed to Foregoing Affidavit:	
1 — Letter From NMU to Defendant Dated January 11, 1971	73a
2 — Letter From Defendant to NMU Dated January 13, 1971	74a
3 — Agreement Effective June 16, 1969 Through June 15, 1972 Between Various Transfer Companies & the NMU .	75a
4 — Arbitration Opinion and Award (Omitted here but printed at p. 3a) .	76a

Contents

	Page
5 — Complaint (Omitted here but printed at p. 1a)	77a
6 — Decision of Wyatt, U.S.D.J. (Omitted here but printed at p. 55a)	78a
Order of Wyatt, U.S.D.J. on February 22, 1971 (71 Civ. 582) (Filed February 22, 1971)	79a
Order of Frankel, U.S.D.J. on February 24, 1971 (71 Civ. 582) (Filed February 25, 1971)	82a
Supplemental Order of Frankel, U.S.D.J. on February 25, 1971 (71 Civ. 582) (Filed February 25, 1971)	84a
Answer of Vantage on March 1, 1971 (71 Civ. 582) (Filed March 1, 1971)	87a
Opinion of Frankel, U.S.D.J. on March 2, 1971 (71 Civ. 582) (Filed March 2, 1971)	92a
Order of Frankel, U.S.D.J. on March 4, 1971 (71 Civ. 582) (Filed March 4, 1971)	111a
Order to Show Cause by Defendant to Resettle Order (71 Civ. 582) (Filed March 19, 1971)	113a

Contents

	Page
Affidavit of D. David Cohen in Support of Motion (71 Civ. 582)	114a
Exhibits Annexed to Foregoing Affidavit:	
A — Proposed Resettled Order	124a
B — Letter to Hon. Saul Streit Dated March 13, 1971	127a
C — Letter From Vantage to Defendant Dated March 15, 1971	130a
D — Vantage Undertaking (Omitted here but printed at p. 58a)	133a
Endorsed Order of Frankel, U.S.D.J. on March 24, 1971 (71 Civ. 582) (Filed March 25, 1971)	134a
Order to Show Cause by Defendant to Dissolve Preliminary Injunction (71 Civ. 582) (Filed May 28, 1971)	135a
Affidavit of D. David Cohen in Support of Motion (71 Civ. 582)	136a
Exhibits Annexed to Foregoing Affidavit:	
A — Proposed Order (Omitted here but printed at p. 124a)	145a

Contents

	Page
B — Order to Show Cause (71 Civ. 2300) .	146a
C — Petition For Injunction (71 Civ. 2300)	148a
C1 — Allegations of Unfair Labor Practice Under Section 8(e) National Labor Relations Act	155a
Decision of Croake, U.S.D.J. on June 22, 1971 (71 Civ. 2300 & 71 Civ. 582) (Filed June 22, 1971)	159a
Decision of Croake, U.S.D.J. on July 15, 1971 (71 Civ. 582) (Filed July 16, 1971) .	183a
Defendants' Notice of Motion Under Rule 8(a) For Order Dissolving Injunction (71 Civ. 582)	189a
Order of Court of Appeals, 2nd Circuit, Denying Foregoing Motion (71 Civ. 582) .	191a
Verified Complaint (72 Civ. 4619) (Filed October 31, 1972)	192a
Exhibits Annexed to Foregoing Complaint:	
A — Provisions of Article 1, Section 2 of Collective Bargaining Agreement . .	217a

Contents

	Page
B — Excerpt From Letter Dated January 11, 1971 From NMU to Defendant . . .	218a
C — Excerpt From Letter Dated January 13, 1971 From Defendant to NMU . . .	219a
D — Decision and Order of the National Labor Relations Board on May 16, 1972 .	220a
Answer of Defendant Commerce Tankers Corp. (72 Civ. 4619) (Filed November 27, 1972)	228a
Answer of Defendant Vernitron Corp. (72 Civ. 4619) (Filed November 27, 1972)	248a
Answer of Defendant NMU (72 Civ. 4619) (Filed November 29, 1972)	251a
Stipulation Dismissing Action Against Defendants Commerce & Vernitron (72 Civ. 4619) (Filed June 22, 1973)	262a
Defendant Commerce's Amended Counterclaims (71 Civ. 582) (Filed July 6, 1974) . .	263a
Plaintiff's Reply to Amended Counterclaims (71 Civ. 582) (Filed June 18, 1974)	277a

Contents

	Page
Stipulated Findings of Fact (72 Civ. 4619 & 71 Civ. 582) (Filed September 23, 1974) . .	286a
Exhibit A — Contract of Sale of the S.S. "Barbara" Annexed to Foregoing Stipulated Findings of Fact	302a
Excerpts of Transcript Commencing January 13, 1975	310a
Excerpts of Transcript January 14, 1975 . .	443a
Excerpts of Transcript January 15, 1975 . .	523a
Excerpts of Transcript of January 16, 1975	652a
Excerpts of Transcript January 17, 1975 . .	766a
Excerpts of Transcript January 20, 1975 . .	914a
Excerpts of Transcript January 21, 1975 . .	1044a
Excerpts of Transcript January 22, 1975 . .	1105a
Excerpts of Transcript January 23, 1975 . .	1179a
Excerpts of Transcript January 24, 1975 . .	1266a
Excerpts of Transcript January 27, 1975 . .	1308a
Stipulated Chronology (72 Civ. 4619 & 71 Civ. 582) Dated January 22, 1975 . ..	1310a

Contents

	Page
Excerpts of Transcript March 5, 1975 . .	1329a
Opinion of Griesa, U.S.D.J. (72 Civ. 4619 and 71 Civ. 582) (Filed March 31, 1976) . .	1383a
Defendant's Notice of Motion for Additional and Amended Findings of Fact (72 Civ. 4619 and 71 Civ. 582) (Filed April 13, 1976)	1441a
Exhibit A — Additional and Amended Findings of Fact Annexed to Foregoing Notice of Motion	1443a
Affidavit of D. David Cohen in Support of Foregoing Motion	1456a
Memorandum of Griesa, U.S.D.J. Endorsed on Foregoing Motion (72 Civ. 4619 and 71 Civ. 582)	1473a
Judgment of Griesa, U.S.D.J. Entered April 19, 1976 (72 Civ. 4619 and 71 Civ. 582) (Filed April 16, 1976)	1474a

WITNESSES

Benjamin K. Sachs:	
Direct	312a
Cross	332a

Contents

	Page
Kenneth Simon:	
Direct	340a
Cross	368a
Mel Barisic:	
Direct	385a
Cross	481a
Redirect	507a
Ned Richardson Phillips:	
Direct	509a
Edward Silver:	
Direct	524a
Cross	652a
Redirect	680a
Herman S. Nathanson:	
Direct	682a, 766a
Cross	746a, 827a, 914a
Redirect	917a
Howard Schulman:	
Direct	707a
Cross	725a
Eugene K. O'Connor:	
Direct	741a
Eugene Spector:	
Direct	971a
Cross	1052a

Contents

	Page
Nathan R. Phillips:	
Cross	1095a
Redirect	1096a
Bernard Levine:	
Direct	1097a
Cross	1107a
Redirect	1117a
Philip T. Corletta:	
Direct	1121a
Cross	1185a, 1218a, 1278a
Lee Redard:	
Direct	1201a
Cross	1214a
Ralph Peterson:	
Direct	1266a
Cross	1272a
Charles Sovel:	
Direct	1293a
Cross	1304a
Robert Lepowsky:	
Cross	1329a

BEST COPY AVAILABLE

RELEVANT DOCKET ENTRIES (71 CIV. 582)

A

CONSOLIDATED WITH 72 Civ 4619

~~JUDGE-WEINFELD~~

CIVIL DOCKET

UNITED STATES DISTRICT COURT

Jury demand date:

71 CIV. 582

GRIESA, J.

D. C. Form No. 106 Rev.

TITLE OF CASE

JUDGE GRIESA

ATTORNEYS

NATIONAL MARITIME UNION OF AMERICA, AFL-CIO

VS

COMMERCE TANKERS CORPORATION

VANTAGE STEAMSHIP CORP.
Intervening deft.

For plaintiff:
Abraham E. Freedman
36 Seventh Avenue
NY 10011 OR 5-4211

~~Marshall, Bratter, Greene, Allison & Tucker~~
~~120 Park Ave. NY 10022 - 421-7200~~

For defendant:
HILL BETTS & NASH
26 Broadway
New York (Vantage Steamship Corp.)

D. David Cohen (sub. 8-1-73)
175 Community Drive, Great Neck, N.Y. 11021
(deft. Commerce Tankers Corp.)

STATISTICAL RECORD	COSTS		DATE	NAME OR RECEIPT NO.	REC.	DISB.
J.S. 6 mailed X	Clerk		5/4/71	Freedman	15 —	
			5/4/71	US Treas		15
J.S. 6 mailed ✓	Marshal					
Basis of Action:	Docket fee					
Labor Management relations Act of 1947	Witness fees					
Action arose at:	Depositions					

NATIONAL MARITIME UNION OF AMERICA, AFL-CIO VS. COMMERCE TANKERS CORP. 71 CIV. 582

JUDGE GRIESA

PROCEEDINGS	Date Order or Judgment Noted
Filed complaint and issued summons.	
Filed Order to Show Cause re: Award Ret. 2/16/71. Ordered that defendant is enjoined and restrained pending the determination of this motion. Wyatt, J.	
Filed stipulation adjourning motion now ret.2/16/71 to 2/23/71.	
Filed (in court) Intervenor, Order to Show Cause. Re: Permit Intervention. Ret. 2-18-71	
Filed (in court) Memorandum in support of motion.	
Filed Undertaking on Injunction ($10,000. Fidelity and Deposit Co. of Maryland).	
Filed Affidavit of Ned R. Phillips in support of pltf's.motion for pre.inj.	
Filed Affidavit on behalf of National Maritime Union,etc., in support of motion.	
Filed Notice of Deposition of Plaintiff.	
Filed MEMORANDUM AND ORDER. The motion of Vantage to intervene is granted; the motion of Vantage for a denial of the motion of NMU to enforce the award is denied. The NMU motion will be on the motion calendar on 2/23 and Vantage can make known its views at that time. Upon compliance with conditions contained in this order, the restraining order will be dissolved. SETTLE ORDER ON NOTICE, which may be short if reasonable. Wyatt, J. Undertaking, Vantage undertakes that if N.M.U. succeeds in this action, Vantage will put N.M.U. in the same position it would have been in had the restraining order been continued including representations by Vantage to the N.L.R.B. appropriate to the purpose. Order that the motion of Vantage for leave to intervene as a deft is granted and Vantage is directed to serve an answer to the complaint not later tha 3-1-71, and that the motion of Vantage for a denial of the motion of NMU to enforce the award of the arbitrator which permanently restrained and enjoined the transfer, sale or conveyance of the said vessel to Vantage by Commerce be denied at this time but this is not a decision on the merits. Upon the posting of a bond in the sum of $278,361 to cover contributions to the NMU Pension Fund for such time up to 6-15-71 as the Barbara is not operated under the Commerce-NMU Collective Bargaining Agreement; further order that the temporary restraining order contained in the order to show cause dated 2-9-71 enjoining and restraining Commerce from delivering the said vessel to Vantage or any other purchaser without complying with Article I, Sec. 2 of the said Collective Bargaining Agreement, be dissolved upon the posting of the bond provided for above. Wyatt J.	
Filed ANSWER to complaint.	MBGA&T
Filed Order that pending determination of pltf's.motion for pre.inj., deft. Commerce Tankers Corp. is enjoined as indicated. Ordered that pltf. shall post security in the amt. of $10,000. Frankel, J.(Mailed notice).	
Filed (in court) that pending the determination of pltff's motion for a prel. inj. deft Commerce Tankers Corp. be enjoined and restrained from transferring its vessel as indicated, further Ordered that pltff shall post security in the amount of $10,000.00 Frankel J.	
2-71 Filed Affidavit of Martin C.Seham.	
2-71 Filed Affidavit of Shannon J. Wall.	
2-71 Filed Affidavit of P.T.Corletta.	
2-71 Filed OPINION #37,180. Frankel, J. For the reasons stated, deft.,its officers, etc. are enjoined and restrained pending the final decision in this case as indicated. It is so ordered. (mailed notice).	
1-71 Filed ANSWER of Intervening deft Vantage Steamship Corp. to the complaint.	HR&N
1-71 Filed (in court) deft affidavit in support of the application of Vantage Steamship to intervene.	
Filed (in court) Memorandum on behalf of Vantage in support of its application for intervention.	

Continued on nextpage.

C

71 Civil 582 National Maritime Union of America etc. vs. Commerce Tankers Corp.

D. C. 110 Rev. Civil Docket Continuation

JUDGE GRIESA

DATE	PROCEEDINGS	Date Ord. Judgment
Feb.18,71	Filed (in court) Brief on behalf of National Maritime Union in opposition to motion of Vantage	
Feb.23,71	Filed (in court) supplemental memorandum in opposition to NMU'S Motion for confirmation of an arbitrator's award and inj. relief etc.	
Feb.18,71	Filed (in court) Memorandum of Commerce Tankers in support of motion of Vantage for leave to intervene.	
Feb. 2,71	Filed Memorandum of Commerce Tankers in support of the motion of Vantage to intervene.	
Mar.4-71	Filed ORDER granting plaintiff's motion for a preliminary injunction; Ordered that pending final decision in this case, defendant, its officers, ets. are enjoined and restrained as indicated; Ordered that Plaintiff shall post a bond in the amt. of $10,000. Frankel, J.(mailed notice).	
Mar.19-71	Filed Order to Show Cause re: Re-Settlement of Order. Ret. 3/23/71.	
Mar.25-71	Filed Affidavit of P.T.Corletta in opposition to application to re-settle.	
Mar.25-71	Filed Reply Affidavit.	
Mar.25-71	Filed MEMO.END. on Show Cause filed 3/19/71. With the hope that this limitation will be understood, the court denies the motion for signing of the resettled order. It is so ordered. Frankel, J.	
Mar.26-71	Filed Notice to take Deposition upon oral examination of Plaintiff.	
Apr.1-71	Filed Undertaking for costs on appeal ($250.00 National Surety Corp.	
Apr.1-71	Filed Intervening deft., Notice of Appeal to USCA mailed copies.	
Apr.2-71	Filed Notice of Appeal by Commerce Tankers Corporation. (mailed copy)	
Apr.5-71	Filed defendant Undertaking for Costs on Appeal ($250.National Surety Corp.)	
Mar 9-71	Filed summons with marshal's ret. Served Commerce Tankers Corp. C/o EmpireShips & Brokers by L.H. McChesney on 2-11-71	
Feb.23-71	Filed (in court) Affidavit in opposition to the motion for Prel. Inj.	
Feb.23-71	Filed (in court) Affidavit of Charles H. Miller, in support of the application of Commerce to have this motion referred to Judge Wyatt.	
Feb.18-71	Filed (in court) Affidavit of D. David Cohen in support of application of Vantage Steamship Corp.	
May 12-71	Filed Certified Record on Appeal to U.S.C.A.	
May 28-71	Filed Order to Show Cause re: Vacate Pr. Inj. Ret. 6/1/71.	
May 28-71	Filed Memorandum of Commerce Tankers Corp. in support of its mission to dissolve pre,inj.	
Jun 17-71	Filed Transcript of record of proceedings, dated 2-18-71	
Jun 22-71	Filed OPINION #37745. Croake, J. (FILED in 71 Civil 2300). See entry in 71 Civil 2300. SETTLE ORDER ON NOTICE. (mailed notice).	
Jul 2-71	Filed Notice of Motion re: Reargument. Ret. 7/13/71 (Filed in 71 Civ. 2300) (AEF)	
Jul 2-71	Filed Memorandum of Law on behalf of Natl. Maritime Union, in support of motion for reargument. (Filed in 71 Civ. 2300).	
Jul 9-71	Filed Memorandum of Commerce Tankers Corp. in opposition to the NMU's motion for reargument. (Filed in 71 Civ. 2300).	
Jul 13-71	Filed (in court) Reply Memorandum on behalf of National Maritime Union of America, AFL-CIO, in support of motion reargument. (Filed in 71 Civil 2300).	
Jul 16-71	Filed counter proposed order(UNSIGNED)	
Jul 16-71	Filed Memorandum of Commerce Tankers Corp. in opposition to the NMU's motion for reargument. (Filed in 71 Civ. 2300).	
Jul 16-71	Filed MEMORANDUM AND ORDER. The motion for reargument is granted; upon reargument the Court is of the opinion that it does possess jurisdiction to modify the preliminary injunction. Rule 62(c) FRCP is unequivocal on this point; etc.etc. The language beginning with "After March 4" on page 21 of the opinion filed 6/22/71 is amended as indicated. (see Memorandum) So ordered. Croake, J. (mailed notice).	
Aug.9-71	Filed transcript of Record of Proceedings of June 4, 1971.	

continued next page

JUDGE GRIESA

Date	PROCEEDINGS	Date Order or Judgment Noted
6-7x	Filed Certified Record on Appeal to the U.S.C.A.	
72	Filed MANDATE of the U.S.C.A with opinion attached. Ordered that the orders of the District Court are reversed and the action remanded to the District Court for further proceedings in accordance with the opinion of the USCA, with costs to be taxed against the appellee, Natl. Maritime Union of America AFL-CIO. Costs taxed in the sum of $270. DOCKETED AS JUDGMENT #72,549 on 5/16/72. Ent. 5/16/72. (mailed notice). (Also in 71 Civ. 2300).	
[illegible]	Filed MANDATE OF THE U.S.C.A. Ordered that the [illegible] (mailed notice). the Mandate be amended so as to provide that the Section 10(a) proceedings in the court below be terminated. (mailed notice). (Also in 71 Civ. 2300).	
	Filed stip. & order substituting attys. for deft. Commerce Tankers Corp.-Griesa, J.	
	Filed defts. notice of deposition of Marine Eng. Beneficial Asst. & Tanker Service, and request for production of documents.	
74	Filed notice on consent of filing of amended counterclaims.	
	Filed deft's amended counterclaims.	
	Filed pltfs. Answers to interrogatories.	
	Filed pltffs reply to amended counterclaim of deft.	
74	Filed pltffs responses to request for admissions.	
74	Filed deft. Commerce Tankers Corp's Notice of deposition of Sidney Braverman.	
	Filed proposed supplementary findings of fact by intervening defts.	
74	Filed stipulated findings of facts for the purposes of the trial of pending actions only.	
75	Filed by (Vantage) chronology of critical facts.	
	Filed by (Vantage) supplementary memo of law.	
	Filed by U.S. Att'y for U.S. Dep't of Commerce, Maritime Adm., affdvt & notice of motion for an order quashing or modifying a subpoena dated 1-7-75. Ret. 1-14-75. (Rec'vd by us 1-16-75)	
16-75	Filed memo of law in support of motion to quash or modify subpoena.	
5-75	Filed affdvt of service of post trial memo of law, etc. by Leo Janowitz.	
35	Filed transcript of record of proceedings, dated JAN. 13, 14, 15, 16, 17, 20-1975	
75	Filed transcript of record of proceedings, dated JAN. 21, 22, 23, 24, 27 - 1975	
3-75	Non-Jury Trial Begun Jan. 13 and Cont'd Jan. 14, 15, 16, 17, 20, 21, 22, 23, 24, 27, Mar. 4, Jun. 17, 1975.	
75	Non-Jury Trial Concluded 6-17-75. total trial days THIRTEEN(13) Dec. Reserved	
	PRE-TRIAL CONFERENCE HELD BY GRIESA, J.	
3-76	Filed Opinion # 44,155 -- for the reason stated, the counterclaims of Commerce against NMU in 71 Civ.582 are dismissed, except that Commerce is entitled to judgment against NMU on the second counterclaim in the amount of $10,000. The complaint of Vintage in 72 Civ. 4619 is dismissed. No costs are awarded as against any party. NMU is directed to submit proposed judgments. So ordered- GRIESA, J. (m/n)	
	Filed deft. Commerce Tankers Corp. notice of motion for an order pursuant to Rule [illegible] requesting the Court to make the additional and amended findings of fact set forth in Exhibit A annexed hereto. Ret. 4-14-76	
	Filed memorandum opinion on motion filed 4-13-76. The motion is denied for the reason stated. So ordered- GRIESA, J. (m/n)	
	Filed Judgment #76,342--that the complaint of National Maritime Union of America is dismissed with prejudice and without costs--that the counterclaims of Commerce Tankers Corp. against National Maritime Union of America are dismissed with prejudice and without costs, except that judgment shall be entered in favor of Commerce Tankers Corp. against National Maritime Union of America	

FYI—LK—12-343—12M—1946

(c nt'd --page # 5)

E

71 CIV. 582-- NATIONAL MARITIME UNION OF AMERICA -vs- COMMERCE TANKERS CORP, etc. 71 CIV.582

(PAGE # 5-- (GRIESA, J.)

D. C. 110 Rev. Civil Docket Continuation

DATE	PROCEEDINGS	Date Order Judgment No.
04-16-76	Filed Judgment # 76,312--(Cont'd).... on the second counterclaim in the amount of $10,000 and that the complaint of Vantage Steamship Corp in 72 Civ. 4619 is dismissed with prejudice and without costs. GRIESA, J. Judgment entered 4-19-76 CLERK (m/n) (also filed in 72 Civ.4619)	
05-06-76	Filed def'-counterclairant notice of appeal from the final judgment entered on 04-16-76 and from the order entered on 04-12-76. Copies mailed to: Abraham E. Freedman and Surrey, Karasik, Morse and Seham. Ent. 05-06-76	
5-27-76	Filed Vantage Steamship's Designation of exhibits to U.S.C.A. (Also filed in 72 civ.4619.)	
5-27-76	Filed National Maritime Unions Designation of exhibits to U.S.C.A. (Also filed in 72 civ. 4619.)	
5-27-76	Filed Commerce Tankers' Designation of exhibits to U.S.C.A. (Also filed in 72 civ. 4619.)	
5-26-76	Filed transcript of record of proceedings dtd: Mar 5-76 (Also filed in 72 civ. 4619)	

A TRUE COPY
RAYMOND F. BURGHARDT, Clerk

By [signature]
Deputy Clerk

RELEVANT DOCKET ENTRIES (72 CIV.4619)

F

CONSOLIDATED WITH 71 CIV. 582

CIVIL DOCKET

UNITED STATES DISTRICT COURT

Jury demand date:

JUDGE GRIESA

72 CIV. 4619

D. C. Form No. 106 Rev.

TITLE OF CASE	ATTORNEYS
VANTAGE STEAMSHIP CORPORATION vs NATIONAL MARITIME UNION OF AMERICA AFL-CIO COMMERCE TANKERS CORPORATION VERNITRON CORPORATION closed 7/23/73	For plaintiff: SURREY, KARASIK, MORSE AND SEHAN 500 Fifth Ave. 10036 239-7200 For defendant: Marshall Bratter Greene Allison & Tucker (Vernitron Corp. Commerce Tankers Corp.) 420 Park Avenue, NYC 10022 421-7200 Abraham E. Freedman (National Maritime Union of America AFL CIO) 36 Seventh NYC 10011 929 8410 D. David Cohen (sub. 8-1-73) 175 Community Drive, Great Neck, NY 11021 (defts. Commerce Tankers & Vernitron Corp.)

UNITED STATES COURT OF APPEALS
FILED
MAY 23 1973
J. DANIEL MASARO, CLERK
SECOND CIRCUIT

STATISTICAL RECORD	COSTS		DATE	NAME OR RECEIPT NO.	REC.	DISB.
J.S. 5 mailed x	Clerk		10-5-72	Lucy K.	15	
			11-3-72	63 Stas		15
J.S. 6 mailed ✓	Marshal					
Basis of Action:	Docket fee					
ANTI TRUST 15 U.S.C.	Witness fees					
$13,376,792.30						
Action arose at:	Depositions					

G

ANTAGE STEAMSHIP CORP. VS NATIONAL MARITIME UNION OF AMERICA, ET AL

JUDGE GRIESA

72 CIV. 4619

DATE	PROCEEDINGS	Date Order or Judgment Noted
cc 31-72	Filed complaint and issued summons.	
ov 20-72	Filed Summons and marshal's ret. Served: Vernitron Corp., on 11/2/72; National Maritime Union of America AFL CIO on 11/6/72; Commerce Tankers Corp. on 11/2/72	
[illegible]	Filed ANSWER BY Commerce Tankers Corp.	MBCA&T
[illegible]	Filed ANSWER BY Vernitron Corp.	
[illegible]	Filed ANSWERof Dft. National Maritime Union of America AFL-CIO.	AEF
[illegible]	Filed Pltffs notice to take deposition of deft. National Maritime Union of America, AFL-CIO on 3/12/73.	
Jan 22-73	Filed stip and order that this action is hereby dismissed with prejudice and without costs, asagainst defts. Commerce Tankers Corp. & Vernitron Corp only. So Ordered Griesa J.	
[illegible]	Filed stip. & order substituting atty. for defts. Commerce Tankers Corp. & Vernitron Corp.--Griesa,J.	
[illegible]-10-73	Filed pltffs affdvt & notice of motion to compel answers to questions. Ret. 10-19-73.	
[illegible]-10-73	Filed pltffs memorandum in support of motion to compel answers.	
[illegible]-73	Filed deft's(National) notice to take deposition of pltff.	
[illegible]-73	Filed memo endorsed on motion filed 10-73--Motion withdrawn. So ordered-Griesa,J.	
[illegible]-74	Filed by deft-counterclaimant (Commerce Tankers) proposed supplementary findings of fact.	
[illegible]-74	Filed Stipulated findings of fact for the purposes of the trial of pending actions only.	
[illegible]-75	Filed by (Vantage) a chronology of certain critical facts. (Ent. & filed in 71 Civ 582)	
[illegible]-75	Filed by (Vantage) supplementary memo of law. (Filed in 71 Civ 582)	
[illegible]-75	Filed Stip & Order consolidating the within action with 71 Civ 582 & disposing of it upon adjudication thereof.....GRIESA,J.	
[illegible]	No further entries	
[illegible]-76	Filed Opinion # 44156-- for the reasons stated, the counterclaims of Commerce against NMU in 71 Civ.582 are dismissed, except that Commerce is entitled to judgment against NMU on the second counterclaim in the amount of $10,000. The complaint of Vantage in 72 Civ.4619 is dismissed. No costs are awarded as against any party. NMU is directed to submit appropriate judgments. So ordered-GRIESA, J. (m/n)	
[illegible]-76	Filed Judgment # 76,342-- that the complaint of National Maritime Union of America in 71 Civ. 582 is dismissed with prejudice and without costs--that the counterclaims of Commerce Tankers Corp. against National Maritime Union of America in 71 Civ. 582 are dismissed with prejudice and without costs, except that judgment shall be entered in favor of Commerce Tankers Corp. against National Maritime Union of America on the second counterclaim in the amt of $10,000.00-- and that the complaint of Vantage Steamship in 72 Civ.4619 is dismissed with prejudice and without costs. GRIESA, J. Judgment entered-4-19-76.Clerk (m/n) (Filed in 71 Civ.582)	
[illegible]-06-76	Filed notice that Vantage Steamship Corp. pltff in this action and intervening defts. in 71 Civ. [illegible] of appeal to USCA from the final judgment entered in these consolidated actions on 4-16-76. Copies mailed to: Abraham E. Freedman and B. David Cohen. ent. 05-06-76	
[illegible]-27-76	Filed Vantage Steamship's Designation of exhibits to U.S.C.A. (Also filed in 71 civ. 582.)	
[illegible]-27-76	Filed National Maritime Union's Designation of exhibits to U.S.C.A. (Also filed in 71 civ.	
[illegible]-27-76	Filed Commerce Tankers' Designation of exhibits to U.S.C.A.(Also filed in 71 civ. 582.)	
[illegible]-26-76	Filed transcript of record of proceedings dtd: Mar 5-76 (Also filed in 71 civ. 582)	

A TRUE COPY
RAYMOND F. BURGHARDT, CLERK
By [illegible]

RELEVANT DOCKET ENTRIES (71-1460) H

GENERAL DOCKET

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

CASE NO. 1460	National Maritime Union of Amer. v. Comm. Tankers Corp.

DATE	FILINGS—PROCEEDINGS	Filed
4-7-71	Filed statement of docket entries and copy of notice of appeal (Commerce Tankers)	
5-12-71	Filed record (original papers of district court)	
6-17-71	Filed order extending time to file appellant's brief and appendix to 7-20-71	
7-20-71	Filed order extending time to file appellant's brief and appendix to 8-20-71	
7-21-71	Filed motion to vacate injunction with proof of service	
7-30-71	Filed affidavit in opposition to motion to vacate injunction with proof of service	
8-9-71	Filed supplemental record (original papers of district court)	
8-17-7	Filed motion for extension of time to file appellant's brief and appendix for sixty days.	
8-19-71	Filed order denying motion to vacate the injunction; appeal be expedited; briefs of appellant and intervening defendant be filed by 9-8-71; appellee's brief by 9-29-71; briefs and appendices may be tw; motion for extension of time be disposed of in accordance with above; appeal shall be heard week of 10-4-71	
8-24-71	Filed record (original papers of district court)(71 Civ. 2300)(& in 71-146	
8-26-71	Filed motion for leave to consolidate appeal with 71-1831 and to expidate appeal in 71-1831 (& in 71-1460)	
9-1-71	Filed order granting motion for leave to consolidate the appeal herein with appeal in docket No. 71-1460; to grant a preference and to direct N.L.R.B. to file and serve its brief by 9-8-71 and respondent's to file and serve their briefs by 9-29-71; to permit N.L.R.B. to adopt appendix filed in 71-1460 by appellants and to file # copies of supplementary exhibit volume, etc. (& in 71-1831)	
9-7-71	Filed 4 copies supplementary exhibit volume (& in 71-1831) with proof of service	
9-8-71	Filed joint appendix (& in 71-1831)	
9-8-71	Filed brief, appellant (Vantage S/S Corp.) (& in 71-1831) with proof of service	
9-8-71	Filed brief, appellant (Commerce Tankers Corp.) (& in 71-1831) with proof of service	
9-9-71	Filed brief, appellant (McLeod) (& in 71-1831) with proof of service	
9-28-71	Filed brief, appellee (National Maritime Union) (& in 71-1831)	
10-4-71	Filed reply brief, appellant (Vantage Steamship Corp.)(& in 71-1831)	

GENERAL DOCKET
UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

CASE NO. 1460	National Maritime Union of America v. Comm. Tankers Corp,
PAGE 3	

DATE	FILINGS—PROCEEDINGS	Filed
10-5-71	Filed 4 copies reply brief, appellant with proof of service (& in 71-1831)	
10-5-71	Filed motion for leave to participate as amicus curiae in oral argument with proof of service (& in 71-1831)	
10-6-71	Filed order denying motion for leave to participate as amicus curiae in oral argument; Maritime Administration may file written memorandum as Amicus at time of argument (& in 71-1831)	
10-7-71	Argument heard (by: Waterman & Smith CJJ and Zampano, DJ) (& in 71-1831)	
10-7-71	Filed brief, amicus curiae	
10-7-71	Leave to file appellee's reply brief by 10-8-71 granted in open court (& in 71-1831)	
10-8-71	Filed brief in response to brief of the Maritime Administration (Appellee) with proof of service (& in 71-1831)	
3-22-72	Judgment Reversed and Action Remanded, Waterman, CJ (& in 71-1831)	
3-22-72	Filed judgment (& in 71-1831)	
4-5-72	Filed itemized and verified bill of costs with proof of service (& in 71-1831)	
4-5-72	Filed petition for rehearing and rehearing in banc with proof of service (& in 71-1831)	
5-4-72	Filed order denying petition for rehearing (& in 71-1831)	
5-4-72	Filed order denying petition for rehearing in banc (& in 71-1831)	
5-11-72	Filed statement of costs	
5-11-72	Issued Mandate (opinion, judgment & statement of costs) (& in 71-1831)	
7-17-72	Filed motion to recall and amend mandate (NLRB) with proof of service	
7-31-72	Filed affidavit in opposition to motion to recall and amend mandate with proof of service	
8-2-72	Filed order amending mandate (& in 71-1831)	
8-2-72	Issued certified copy of order to District Court amending mandate (& in 71-1831)	

J

GENERAL DOCKET

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

CASE NO. 1460	National Maritime Union of America v. Comm. Tankers Corp.

DATE	FILINGS—PROCEEDINGS	Filed
8-21-72	Original and supplemental records returned to district court.	
8-29-72	Filed receipt of return of original record to district court.	

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

NATIONAL MARITIME UNION OF AMERICA, AFL-CIO

Plaintiff

-against-

COMMERCE TANKERS CORPORATION,

Defendant

---

71 Civ.

COMPLAINT

The National Maritime Union of America, AFL-CIO, complaining of the defendant, Commerce Tankers Corporation, respectfully alleges as follows:

1. Plaintiff, National Maritime Union of America, AFL-CIO, (hereinafter referred to as the "Union"), is an unincorporated association having its principle offices in the Borough of Manhattan, City and State of New York, and is a labor organization as defined in Section 2(5) of the Labor Management Relations Act of 1942, 29 U.S.C. 151 et seq.

2. Defendant, Commerce Tankers Corporation, is a corporation engaged in the steamship business with its principle place of business at 50 Fifth Avenue, Borough of Manhattan, City and State of New York.

3. Jurisdiction is conferred on this court by 29 U.S.C. 185 of the Labor Management Relations Act.

4. Plaintiff is the sole and exclusive collective bargaining representative for all unlicensed personnel employed aboard defendant's vessel, the S.S. "Barbara".

5. Defendant has entered into a collective bargaining agreement covering wages, hours, working conditions, for all unlicensed personnel aboard said vessel. (A copy of this Agreement is annexed hereto, made part hereof, marked Exhibit 1).

6. In violation of the aforesaid collective bargaining agreement, defendant has contracted for the sale of the vessel, S.S. "Barbara".

7. On February 8, 1971, an arbitration award was entered herein resolving the grievance arriving out of the abovementioned sale, in which the arbitrator restrained and enjoined defendant from selling said vessel to any purchaser without compliance with said collective bargaining agreement. (Copy of said award is annexed hereto, made part hereof, marked Exhibit 2).

WHEREFORE, plaintiff prays that an order be entered by this Honorable Court;

a) confirming the award of the arbitrator;

b) permanently restraining and enjoining defendant from the sale of the S.S. "Barbara" to any purchaser without complying with Article I, Section 2, of the collective bargaining agreement.

c) granting such other and further relief as to the court seems proper under the circumstances.

Dated: New York, N.Y.

ABRAHAM E. FREEDMAN

By _____
Attorney for Plaintiff
36 Seventh Avenue
New York, N.Y. 10011

- x

In the Matter of the Arbitration

between

NATIONAL MARITIME UNION OF AMERICA, AFL-CIO

and

COMMERCE TANKERS CORPORATION

APPEARANCES:

For the Union
Abraham E. Freedman
By: Mr. Ned R. Phillips
Mr. Charles Sovel

For the Company
Mr. D. David Cohen
Mr. Kenneth Simon

OPINION AND AWARD

Article I, Section 2, of the Collective Bargaining Agreement provides that in the case of a sale or transfer of a vessel presently under contract with the Union, for operation under United States flag, that the seller, as a condition precedent of the sale, "obtain a written undertaking with the Union to be executed by the business entity to which the vessel has been sold" that the complement of employees shall be provided by the Union in accordance with the terms of the Agreement.

I am satisfied from the proofs that the Company has entered into a contract of sale of the S.S. "Barbara" to Vantage Steamship Corporation without as yet complying with Article I, Section 2, of the Collective Bargaining Agreement.

I, therefore, direct, order, and award, that the Company is hereby enjoined and restrained from delivery

of the vessel to Vantage Steamship Corporation or any other purchaser without complying with Article I, Section 2, of the Collective Bargaining Agreement.

Dated: New York, N. Y.
February 8, 1971

THEODORE W. KHEEL
Arbitrator

STATE OF NEW YORK)
) SS.:
COUNTY OF NEW YORK)

On this 8th day of February, 1971, before me came and appeared THEODORE W. KHEEL, to me known and known to me to be the individual described in and who executed the foregoing instrument, and he duly acknowledged to me that he executed the same.

RUTH IVEY
Notary Public, State of New York
No. 03-7048310
Qualified in Bronx County
Certificate Filed in New York County
Commission Expires March 30, 1972

NMU's ORDER TO SHOW CAUSE (71 CIV.582) (Filed February 9, 1971)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

NATIONAL MARITIME UNION OF AMERICA, AFL-CIO,

Plaintiff

-against-

COMMERCE TANKERS CORPORATION,

Defendant

----------x

71 CIVIL 582

ORDER TO SHOW CAUSE

FILED IN COURT
FEB 9 1971

On reading the affidavit of Ned R. Phillips, duly verified on the 8th day of February, 1971, the award of the arbitrator herein dated the 8th day of February, 1971, and duly verified on the 8th day of February, 1971, and on motion of Abraham E. Freedman, attorney for plaintiff National Maritime Union, [illegible] it is

ORDERED, that defendant show cause at a Motion Term of this Court, held in the United States Courthouse, Borough of Manhattan, City and State of New York, on the 16th day of February, 1971, at 10:00 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, why an order should not be made and entered herein confirming the award of the arbitrator pursuant to Section 185(a) of the Labor Management Relations Act, and permanently restraining and enjoining the transfer, sale, or conveyance of the S.S. "Barbara" to Vantage Steamship Corporation or any other purchaser until and unless defendant complies with said arbitration award, and it is further

ORDERED, that pending the determination of the motion brought on by this order to show cause, and the entry of an order thereon, good cause appearing therefor, the defendant be and it

hereby is enjoined and restrained from delivery of the vessel, S.S. "Barbara", to Vantage Steamship Corporation or any other purchaser without complying with Article I, Section 2, of the Collective Bargaining Agreement between the parties.

Sufficient cause appearing therefor, let service of a copy of this order and the papers upon which it is based upon the defendant Commerce Tankers Corporation, at the office of Commerce Tankers Corporation, 500 Fifth Avenue, Borough of Manhattan, City and State of New York, on or before 2 o'clock noon on the 9th day of February, 1971, be deemed good and sufficient service thereof, and it is further ordered that plaintiff shall post an undertaking in the amount of $10,000

S/ Lawrence B. Walsh
U. S. D. J.

ENTERED:

EXH | 64

(1)

FILE NEW C-

STIPULATION ADJOINING MOTION (Filed February 11, 1971) (71 CIV. 582) 7a

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

- - - -

VANTAGE'S ORDER TO SHOW CAUSE - MOTION TO INTERVENE
(71 CIV. 582) (Filed February 16, 1971)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

DEFT EX. C/9 FOR ID.
R. JACOBS 4/8 1971

NATIONAL MARITIME UNION OF AMERICA, AFL-CIO,

Plaintiff

-against-

COMMERCE TANKERS CORPORATION,

Defendant

Index No. 71 Civil 582

ORDER TO SHOW CAUSE

On reading the Affidavit of P. E. CORREIA duly verified on the 16th day of February, 1971 and on motion of Hill, Betts & Nash, attorneys for Vantage Steamship Corp., it is

ORDERED, that National Maritime Union of America, AFL-CIO, plaintiff abovenamed, and Commerce Tankers Corporation, defendant abovenamed, show cause at a motion term of this Court to be held in the United States Courthouse, Borough of Manhattan, City and State of New York on the ~~16th~~ 18th day of February, 1971 at ~~10:00~~ 2:30 o'clock in the ~~forenoon~~ afternoon of that day, or as soon thereafter as counsel can be heard, why an order should not be made and entered herein pursuant to Rule 24(A) of the Federal Rules of Civil Procedure ordering that Vantage Steamship Corp. be (a) permitted to intervene in this proceeding; (b) that the application of NMU for an order permanently restraining and enjoining the transfer, sale or conveyance of the SS "BARBARA" to Vantage Steamship Corp. be denied in all respects; (c) dissolution of the outstanding restraining

order and (d) that Vantage Steamship Corp. have such other and further relief as to this Court may seem just and proper.

Sufficient cause appearing therefor, let service of a copy of this Order and the papers upon which it is based upon the attorneys for National Maritime Union of America, AFL-CIO, plaintiff herein, and Commerce Tankers Corporation, defendant herein ~~in Court on or before call of the Calendar for the hearing of the motion brought on by Order to Show Cause by National Maritime Union~~ on February 10, 1971 at 4:00 PM of America, AFL-CIO, plaintiff herein, against Commerce Tankers Corporation, defendant herein, as above stated be deemed good and sufficient service thereof.

IRVING B. WALT
U. S. D. J.

Feb 16, 1971
9:45 AM

AFFIDAVIT OF P.T. CORLETTA IN SUPPORT OF FOREGOING MOTION TO INTERVENE (71 CIV. 582)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

NATIONAL MARITIME UNION OF AMERICA, AFL-CIO, Plaintiff -against- COMMERCE TANKERS CORPORATION, Defendant	Index No. 71 Civil 582 AFFIDAVIT ON BEHALF OF INTERVENOR VANTAGE STEAMSHIP CORP.

STATE OF NEW YORK)
COUNTY OF NEW YORK) SS.:

P. T. CORLETTA, being duly sworn, deposes and says:

1. I am the President of Vantage Steamship Corp., (hereinafter "Vantage"), a New York corporation having its principal place of business at 11 Broadway, New York, N.Y.

2. This Affidavit is submitted in support of an application pursuant to Rule 24A of the Federal Rules of Civil Procedure

(a) to intervene in this proceeding instituted by the National Maritime Union of America, AFL-CIO (hereinafter "NMU") pursuant to which NMU has requested this Court to issue an order pursuant to Rule 65 of the Federal Rules of Civil Procedure confirming the award of the arbitrator pursuant to Section 185(a) of the Labor Management Relations Act and permanently restraining and enjoining the transfer, sale or

conveyance of the SS "BARBARA" to Vantage or any other purchaser until and unless Commerce Tankers Corporation (hereinafter "Commerce") complies with said arbitration award;

(b) to request the denial of the application made by NMU; and

(c) to request that the restraining order previously obtained shall be vacated; and

(d) for such other relief as to this Court shall seem just and proper.

3. Vantage is engaged in the business of owning and operating United States vessels in coastwise and foreign commerce.

4. At all times mentioned herein, Commerce was a Delaware corporation and was the owner of the SS "BARBARA" (hereinafter called the "Vessel"), official number 248079 of about 15,158 gross and 10,632 net register tons, documentation under the flag of the United States of America.

5. On December 23, 1970 Vantage entered into a written contract with Commerce pursuant to which Commerce agreed to sell and Vantage agreed to buy the Vessel for a total purchase price of $2,750,000. A copy of the said contract is annexed hereto as Exhibit A and is hereinafter referred to as the "Contract of Sale"). Pursuant to the said Contract of Sale, Vantage has deposited in escrow the sum of $275,000 in the joint names of Vantage and Commerce with Franklin National Bank, New York, N.Y. The said sum remains on deposit in escrow.

6. In reliance upon the Contract of Sale, Vantage entered into a charter party (hereinafter the "Charter Party")

with Standard Oil Company of California providing for the charter of the Vessel for 365 days at a charter hire rate of $10.35 per dead weight ton per month, which amounts to $271,863.45 per month and $3,262,361.40 for the charter period. The earnings from the Charter Party are anticipated by Vantage to be about $2-million.

7. The Contract of Sale provides that the Vessel shall be delivered to Vantage on or before February 28, 1971. The cancelling date under the Charter Party is March 5, 1971. A copy of the Charter Party is annexed hereto as Exhibit B.

8. Mr. D. David Cohen, an officer of Commerce, informed your deponent on February 4, 1971, approximately a month and a half after the contract for purchase of the Vessel had been executed, that Commerce had a collective bargaining agreement with NMU which, in substance prohibited Commerce from selling or transferring any of its vessels to a purchaser or transferee unless the purchaser or transferee (a) agreed to furnish a written undertaking with NMU that, for the full term of the collective bargaining agreement between Commerce and NMU, all of the terms and provisions of such collective bargaining agreement would apply to the Vessel, and (b) agreed to comply with all of the terms and provisions of the said collective bargaining agreement including, but not limited to, employing only members of NMU. I advised Mr. Cohen that Vantage already had union contractual relationships and that we would insist upon our written contract right to purchase the vessel.

9. Commerce sent a telegram to Vantage dated February 6, 1971, which reads as follows:

"(58) SYD296
SY MIA230 PD TDMN GREAT NECK NY 5 435P EST
VANTAGE STEAMSHIP CORP
11 BROADWAY, NEW YORK, N.Y.

OUR EFFORTS TO OBTAIN CONSENT OF NATIONAL MARITIME UNION (NMU) TO SALE AND TRANSFER OF VESSEL SS BARBARA TO VANTAGE PURSUANT TO AGREEMENT OF DEC 21 (sic) 1970 HAS BEEN UNSUCCESSFUL THUS FAR A WRITTEN UNDERTAKING TO COMPLY WITH THE TERMS AND CONDITIONS OF UNION AGREEMENT WITH NMU TO BE EXECUTED BY VANTAGE OR A SUBSIDIARY OR ASSIGNEE OF VANTAGE IS NECESSARY TO CONSUMMATE THE TRANSACTION IF WE ARE UNABLE TO DELIVER SUCH AN UNDERTAKING TO NMU IRRESPECTIVE CIRCUMSTANCES BEYOND OUR CONTROL MAY IRRETRIEVABLY PREVENT TRANSFER OF TITLE OR POSSESSION OF VESSEL

COMMERCE TANKARD CORP. "

BEST COPY AVAILABLE

(45)."

10. The Contract of Sale is not conditioned upon (a) Commerce obtaining approval of the NMU to the sale and transfer of the Vessel or (b) an undertaking by Vantage to comply with the terms and conditions of the NMU collective bargaining agreement. Therefore, Vantage replied to the said telegram by a telegram dated February 8, 1971 which reads as follows:

"TO COMMERCE TANKERS CORPORATION
c/o VENTRON CORPORATION
LAKE SUCCESS PARK COMMUNITY DRIVE
GREAT NECK, N.Y. 11021 ATTN: MR. H. NATHANSON

WE HAVE YOUR TELEGRAM OF FEBRUARY 6, 1971 RELATING TO THE CONTRACT BETWEEN US DATED DECEMBER 23, 1970 FOR THE SALE OF THE VESSEL BARBARA STOP WE STAND READY WILLING AND ABLE TO PERFORM THE CONTRACT ON OUR PART AND LOOK TO YOU TO DO LIKEWISE STOP AS YOU KNOW WE HAVE CHARTERED THE VESSEL OUT AND WILL SUFFER SUBSTANTIAL DAMAGES AND LOSSES IF YOU FAIL TO PERFORM THE CONTRACT STOP YOUR CONTRACT WITH US IS NOT CONDITIONED ON YOUR OBTAINING THE CONSENT OF THE NATIONAL MARITIME UNION OR ANY OTHER UNION TO THE SALE AND TRANSFER OF THE VESSEL STOP WE NOTE THAT YOU INCORRECTLY REFERRED TO THE CONTRACT AS BEING DATED DECEMBER 21, 1970 .

VANTAGE STEAMSHIP CORP.

Sender's Tel. No. 425-6161
Name & Address
Vantage Steamship Corp.
11 Broadway, N.Y.C."

11. On February 10, 1971 Commerce sent Vantage a letter dated that day giving notice of its intention to invoke the arbitration provision of Paragraph 14 of the Contract of Sale to settle disputes and differences between the parties to the Contract of Sale, "including but not limited to the issues of whether the Contract is enforcible and whether Vantage Steamship Corp. is obligated to furnish a written undertaking to comply with the terms of the union contract now in existence between Commerce Tankers Corporation and The National Maritime Union of America, AFL-CIO" and enclosing a copy of an order filed in Court February 9, 1971, signed by The Honorable Inzer B. Wyatt of The United States District Court for the Southern District of New York enjoining Commerce from delivering the Vessel to Vantage. A copy of the said letter and of the order enclosed therewith is attached thereto as Exhibit C.

12. Neither Vantage nor any of its affiliated companies has a collective bargaining agreement with the NMU. The written contract between Vantage and Commerce contains no reference to any requirement of a contractual relationship with the NMU either before or after transfer of the ship's title.

13. Commerce, having failed to pursue its proper remedy by submitting the matter for determination by the NLRB, Vantage, as an aggrieved party, on February 12, 1971, filed charges with the National Labor Relations Board against Commerce and NMU. Copies of these charges are annexed hereto as Exhibits D, E and F.

14. Vantage will suffer irreparable harm if Commerce is restrained and enjoined from delivering the Vessel

to Vantage pursuant to the Contract of Sale. I am advised that the subject Vessel is the last one belonging to Commerce and that company should not be subject to any loss as a consequence of the transfer of title; indeed, Commerce is not even susceptible to illegal pressures from the NMU. Since the Maritime industry is a "hiring hall" industry in which there is no necessary continuity of employment for seamen from one voyage to the next, no individual seaman represented by the NMU will suffer any loss as a consequence of the transfer; the law requires, as I understand it, that even NMU members be given non-discriminatory opportunities to apply for employment. Vantage, therefore, is the only party exposed to substantial loss and that loss will certainly ensue from the prevention of its acquisition of the Vessel and Vantage's consequent failure to meet its charter obligations.

15. I have been informed by counsel that the provisions of the collective bargaining agreement between Commerce and NMU referred to in Paragraph 11 above are illegal as being in violation of Section *(e) and other sections of the National Labor Relations Act; that those provisions constitute an illegal restraint on alienation of property, and that those provisions are in violation of the Sherman Act.

16. Telegraphic notice of this application was given to counsel for Commerce and the NMU on February 13th.

WHEREFORE, Vantage Steamship Corporation applies to this Court for the following relief:

a. that it be permitted to intervene in this proceeding;

b. that the application of NMU for an order permanently restraining and enjoining the transfer, sale or conveyance of the SS "BARBARA" to Vantage Steamship Corporation be denied in all respects;

c. That the restraining order previously obtained shall be vacated; and

d. that Vantage Steamship Corporation have such other and further relief as to this Court may seem just and proper.

P. T. [illegible]

Sworn to before me this
16th day of February, 1971.

Notary Public

JOHN F. LANG
Notary Public, State of New York
No. 31-[illegible]
Qualified in New York County
Commission Expires March 30, 197[illegible]

PLAINTIFF'S UNDERTAKING ON INJUNCTION (71 CIV. 582) (Filed February 17, 1971)

NY 2210b—500. 3 68 1786v.

~~XXXXXXXXXXXX~~ U. S. DISTRICT COURT

~~XXXXXXXX~~ SOUTHERN DISTRICT OF NEW YORK

U.S. DISTRICT COURT FILED FEB 17 1971 S.D. OF N.Y.

71 CIV 582

NATIONAL MARITIME UNION OF AMERICA, AFL-CIO,

Plaintiff,

-against-

COMMERCE TANKERS CORPORATION,

Defendant.

UNDERTAKING ON INJUNCTION

WHEREAS, the Plaintiff above named, has about to apply or is applied for an injunction in the above entitled action, restraining the Defendant from doing certain things as more fully set forth in the order dated February 9, 1971 therein.

NOW, THEREFORE, the FIDELITY AND DEPOSIT COMPANY OF MARYLAND, having an office and principal place of business for the State of New York at 140 William Street, New York City 10038, does hereby, pursuant to the Statute in such case made and provided, undertake that the Plaintiff will pay to the Defendant Commerce Tankers Corporation such damages not exceeding the sum of TEN THOUSAND AND NO/00---------- as the Defendant may sustain by reason of the injunction, if the Court shall finally decide that the Plaintiff was not entitled thereto; such damages to be ascertained by a reference, or as the Court shall direct.

Dated: February 11, 1971

FIDELITY AND DEPOSIT COMPANY OF MARYLAND

By _____

Resident Vice-President of New York and Attorney-in-Fact

(6)

At a meeting of the Executive Committee of the Board of Directors of the Fidelity and Deposit Company of Maryland, held at the City of Baltimore, State of Maryland, on the 4th day of December, 1969, the following resolution was adopted:

Resolved, That the President, Vice-Presidents, Frank P. Richardson, James M. Hutchins, M. V. Atwood, Jr., Clarence H. Venable, M. S. Benson, Joseph R. Bowen, E. Pallett, Robert L. Frey, of the City of New York, State of New York, Resident Vice-Presidents, Attorneys-in-Fact, and Resident Assistant Secretaries of this Company in the City of New York, State of New York, be and they are hereby severally empowered to execute for and on behalf of this Company, and affix the corporate seal of this Company to any and all bonds or undertakings, also to perform any and all acts for or on behalf of this Company which may be necessary or proper in the premises in connection with the execution of such bonds or undertakings, also to perform any and all acts for or on behalf of this Company in the execution of powers hereinbefore granted, and the performance of such acts shall be as binding upon this Company as if done by the President or Secretary of this Company under its corporate seal; and be it further

Resolved, That the above named Attorneys-in-Fact, and each of them, be and they are hereby severally authorized and empowered to execute for and on behalf of this Company, and affix the corporate seal of this Company, to this Resolution within the limits hereinbefore specifically prescribed for each of them; and be it further

Resolved, That the certificate under the seal of this Company which the Secretary thereof executed pursuant to the resolution adopted by the Executive Committee of the Board of Directors of this Company on August 7, 1969, in behalf of W. E. Hendrickson, Jr., Frank P. Richardson, James M. Hutchins, M. V. Atwood, Jr., Clarence H. Venable, M. S. Benson, Joseph R. Bowen, Albert C. Hendershott, John L. Briscoe, D. R. Buonanno, C. C. Dewey, John J. D'Amico, A. V. Gallo, M. S. Benson, Joseph E. Pallett, Robert L. Frey, Robert T. Molyneux, J. D. Provenzano and Dorothy M. Trost,

18a

STATE OF NEW YORK
COUNTY OF New York } ss:

I, C. C. Lewis, Attorney-in-Fact of the Fidelity and Deposit Company of Maryland, have compared the foregoing Resolution with the original thereof as recorded in the Minute Book of said Company, and do hereby certify that the same is a true and correct transcript therefrom and of the whole of said original Resolution, and that the said Resolution is still in full force and effect.

Given under my hand and the seal of the Company, at the City of New York, this 11th day of February, 19 71

C. C. Lewis
Attorney-in-Fact

STATE OF NEW YORK
COUNTY OF New York } ss:

On the 11th day of February 1971, before me personally came C. C. Lewis, to me known, who being by me duly sworn, did depose and say, that he resides at 58 Bismark Avenue Valley Strenm

State of New York, that he is Attorney-in-Fact of the Fidelity and Deposit Company of Maryland, the corporation described in and which executed the within instrument; that he knows the corporate seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order; and that the Fidelity and Deposit Company of Maryland is duly authorized to transact business in the State of New York in pursuance of the statutes in such case made and provided; that the Superintendent of Insurance of the State of New York has, pursuant to Chapter 28 of the Consolidated Laws of the State of New York, known as the Insurance Law, issued to the Fidelity and Deposit Company of Maryland a Certificate of Solvency and of qualification to become surety or guarantor on all bonds, undertakings, recognizances, guarantees and other obligations required or permitted by law; and that such certificate has not been revoked.

ROBERT T. MOBYED
Notary Public, State of New York
No. 41-2736185
Qualified in Queens County
Certificate filed in New York County
Term Expires March 30, 1971

Robert T. Mobyed
Notary Public

SUPREME COURT

COUNTY OF

UNDERTAKING ON INJUNCTION

SURETY:

Fidelity and Deposit Company
OF MARYLAND

I approve of the within Undertaking and of the sufficiency of the Surety therein.

Dated Feb-17-1971

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- X

NATIONAL MARITIME UNION OF AMERICA, AFL-CIO,

Plaintiff,

- against -

COMMERCE TANKERS CORPORATION,

Defendant.

71 Civ. 582

AFFIDAVIT

- X

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

D. DAVID COHEN, being duly sworn, deposes and says:

1. I am a member of the bar of this Court, Assistant Secretary of Commerce Tankers Corporation ("Commerce") and corporate counsel to Vernitron Corporation ("Vernitron"), the parent company of Commerce.

2. I make this affidavit in support of the application of Vantage Steamship Corp. ("Vantage") pursuant to Rule 24A of the Federal Rules of Civil Procedure:

(a) to intervene in this proceeding instituted by the National Maritime Union of America,

AFL-CIO in which NMU has requested that this Court issue an order pursuant to Rule 65 of the Federal Rules of Civil Procedure confirming the award of the arbitrator pursuant to Section 185(a) of the Labor Management Relations Act and permanently restraining and enjoining the transfer, sale or conveyance of the SS "BARBARA" to Vantage or any other purchaser until and unless Commerce Tankers Corporation (hereinafter "Commerce") complies with said arbitration award;

(b) to request the denial of the above-described application made by NMU;

(c) to request that the temporary restraining order previously obtained by NMU be vacated; and

(d) for such other relief as to this Court shall seem just and proper.

3. Vernitron is a publicly owned company, the equity and debt securities of which are traded upon the American Stock Exchange.

4. In October of 1970, in order to overcome certain business problems, Vernitron determined to re-organize the structure of the Company. The plan of reorganization required the immediate repayment of more than $6,500,000 owed to certain short-term bank lenders. Part of the plan of reorganization called for the sale of the two vessels, the SS "THALIA" and the SS "BARBARA" owned and operated by Commerce. By so doing, Commerce and

Vernitron would thereby be going out of the shipping business entirely. In order to achieve maximum operating efficiency, Vernitron directed Commerce to sell both vessels simultaneously.

5. In December of 1970 a buyer for the Vessel THALIA was ready and willing to consummate a transaction. An agreement of purchase and sale was entered into and the THALIA was sold and delivered to the buyer on or about December 23, 1970. The buyer of the THALIA had a history of dealing with the NMU and agreed to continue the NMU crew upon the vessel.

6. In late December, Commerce was also introduced to Vantage as a proposed buyer for the Vessel BARBARA. Negotiations were had on December 22, and an agreement relating to the sale of the BARBARA was entered into on December 23, 1970, which agreement is annexed as Exhibit "A" to the affidavit of P. T. Corletta in support of Vantage's order to show cause.

7. In view of the disposition of the Vessels and other significant business steps taken, Vernitron was able to reassure its financial integrity by arranging for a refinancing of its $15,000,000 indebtedness to Hambros Bank, Ltd., which was accomplished as of January 15, 1971. At the present time, Vernitron's short term bank indebtedness is approximately $2,000,000, which it is obligated to repay entirely upon consummation of the sale of the BARBARA.

8. Commerce is a party to a collective bargaining agreement with the NMU dated as of June 15, 1969. Said agreement ("NMU Agreement") is an industry-wide arrangement which, upon information and belief, was arrived at through negotiations by and between the NMU and the association of subsidized American flag carriers. Thereafter the contract was presented to independent carriers such as Commerce. Commerce's choice at the time was either to sign the contract presented to it or to face the threat of collective action by its employees. The realities of the maritime industry -- and the distribution of economic power -- are such that the choice was, in fact, no choice at all.

9. The provisions relating to the "undertaking" required to be obtained by an operator which has sold or transferred a vessel were inserted in the NMU Agreement for the first time in 1969. It appears that no other party has ever been coerced by the NMU into enforcement of the provision. Upon information and belief, there is no precedent whatsoever for the drastic relief of injunction to enforce such a provision of the kind which the NMU presently seeks to have this Court confirm.

10. In negotiating the Contract of Sale for the BARBARA, Vantage was aware that the BARBARA was manned by an NMU crew, pursuant to the standard NMU contract, and Commerce was advised that Vantage had fleet-wide representation by SIU for Vantage's vessels. Vantage's affidavit in support of the instant motion seems to suggest that responsibility for the present problem must be borne by

Commerce. Although Commerce disagrees, both with respect to the legal conclusions and the factual bases for Vantage's suggestion, that disagreement is not germane to the issues presently before the Court and can be dealt with, if necessary, at an appropriate time.

11. Commerce and Vantage agree, however, that irreparable harm will result to the private parties, or one of them, in the event that the NMU is allowed to stop Commerce, a willing seller, from disposing of its property to Vantage, a willing buyer. Vantage projects its loss at $2,000,000. Vernitron would, if the injunction is not set aside, be deprived of consummating a sale of the BARBARA to Vantage -- and would be limited to sale to a "class of purchasers" acceptable to the NMU. There can be no assurance -- and the NMU makes no such allegation -- that there is such a buyer ready and available to purchase the BARBARA on the terms and conditions required by Commerce and Vernitron, in order to assure that Vernitron will be able to meet all of its financial commitments.

12. On or about Thursday, February 4, 1971, a meeting was held at the offices of Vantage, at which time the issues confronting the parties were discussed. Vantage first stated that it intended that the burden of delivery of the Vessel BARBARA was on Commerce irrespective of the obstacles which might be set up by the NMU, and it advised Commerce to seek the cooperation of the NMU.

13. A meeting was immediately sought with the officials of the NMU and such meeting was had on the afternoon

of Friday, February 5th. At the meeting, the representatives of the NMU advised Commerce for the first time that the relief it intended to seek before the arbitrator was an injunction forbidding the sale and transfer of the Vessel BARBARA to Vantage or any other buyer who failed or refused to provide an undertaking to continue the NMU as the union for the affected employees. Request was made of the NMU representatives for a reasonable adjournment of the arbitration set for Monday, February 8th. Commerce promised and assured that the Vessel would not be sold or transferred in the interim period. The NMU representatives refused to grant any such adjournment.

14. On Monday, February 8, 1970, an arbitration was held before Hon. Theodore Kheel, arbitrator for the industry. The NMU presented no written statement of the issues, no witnesses and no testimony other than two documents tending to indicate that Commerce had agreed to sell the BARBARA to Vantage without first obtaining an undertaking that the NMU be continued as collective bargaining representative for the affected employees. Commerce conceded that fact but argued before the arbitrator that there were serious questions of law presented by the NMU's application, including (a) whether injunctive relief was appropriate under Section 2 of the NMU Agreement; (b) whether Section 2 had any applicability to an operator going out of the shipping business entirely; and (c) whether, if read to permit such broad relief, the provision was violative of the anti-trust laws. Commerce solely sought seventy-two (72) hours to brief the issues of law to be arbitrated.

15. NMU's counsel successfully advocated that even a brief delay should not be granted, citing the fact that Commerce had had adequate notice of the arbitration proceeding and arguing, despite counsel's offer to provide adequate assurances that the vessel would not be sold or transferred in the interim period, that in fact such disposition might occur.

16. Counsel for the NMU stated before the arbitrator that "no one in the shipping industry could be trusted." The NMU's stance permitted it to obtain the relief it sought without witnesses, without testimony, without any written statement of the issues and without an adequate opportunity for either of the parties to bring the issues into focus before the arbitrator because, in fact, there is a wealth of authority which disputes the artificial reading given to Section 2 of the Union Agreement by the NMU. Such authority includes nothing less than the sworn affidavit of the President of the NMU, Mr. Joseph Curran, which affidavit is annexed hereto as Exhibit 1 hereof. In said affidavit, Mr. Curran sets forth as fact, the following propositions, all of which weigh heavily against the NMU position in this proceeding:

> "There can be no question that in the Maritime industry fleet-wide representation by a single union is the prevailing and traditional rule; such unit is ordinarily the only appropriate unit; and historically for most employers (whether under NMU, SIU or SUP contract) it has been the only

unit that has been recognized.

"THE RULE IS ESTABLISHED AND OF LONG STANDING THAT THE UNION WHICH IS THE EXCLUSIVE BARGAINING REPRESENTATIVE OF AN EMPLOYER'S UNLICENSED SEAMEN AUTOMATICALLY REPRESENTS THE CREWS OF NEWLY-ACQUIRED VESSELS.

"The maritime industry is a volatile one in which there is a constant stream of sales, exchanges and other types of transfers of vessels among employers. To preserve the principle of fleet-wide representation by a single union, indeed to preserve sanity in the industry, the rule inevitable followed is, that the union with which an employer customarily deals is recognized automatically as bargaining representative for any newly-acquired vessels.

"The collective bargaining agreements in the industry by their terms envision this.

"For this reason, a practice of long standing has developed among existing maritime unions that whenever a change of ownership or control in a vessel occurs, the union which customarily deals with the transferee or acquiring operator automatically succeeds to the status of bargaining representative.

"* * * any attempt * * * to decree that * * * representation rights run with the vessels would be

an invasion of the field of exclusive jurisdiction reserved by Congress to the NLRB.

"* * * that due process and fairness requires that any limitation forfeiture or usurption of NMU's established contract rights should take place only under the plenary processes of the NLRB, which is the only federal agency with the lawful authority, experience and training to regulate these matters. The NLRB alone through its quasi-judicial powers can satisfactorily and permanently resolve this problem with due regard for the rights and interests of all parties."

17. Also annexed hereto, as Exhibits 2 and 3 respectively, are the affidavits of John T. Collins, an adviser to the Texaco Tanker Officers Association, and M. E. Lundfelt, an employee of the Marine Department of Texaco, Inc., both of which were submitted in connection with the same proceedings as the Curran affidavit. These affidavits clearly and unequivocally stand for the proposition that it is the customary, usual and accepted practice in the maritime industry for the purchaser of a vessel to crew its vessel with employees selected by it and represented by the collective bargaining unit with which the fleet owner has a collective bargaining agreement. The principle of labor relations law under which such arrangements are sanctified is known as the fleet-wide representation rule. The fleet-wide rule is the general rule applied by the NLRB in the selection of the proper collective bargaining agent.

And, although some exceptions have been carved into the fleet-wide rule, none of those exceptions involve the coercive conduct and provisions sought to be utilized by the NMU herein. That is the established nature of the arrangements and relationships in the maritime industry. The NMU's attempt to employ the injunctive power of this Court seeks to destroy these arrangements and relationships which have been fostered by the NLRB, accepted by the maritime industry, and represented by the NMU's President as "practice of long-standing" by his and other maritime unions.

18. Vantage has appropriately labeled the award sought to be confirmed by the NMU the result of a "quickie" arbitration. Another example of the factual disagreements between Commerce and Vantage not germane at the present time, is Vantage's mistaken assertion that Commerce was a "complacent" victim of the arbitration. Commerce desperately sought an ample opportunity to brief the issues presented by the NMU's application for novel relief. In view of the NMU's extraordinary conduct -- not disclosing material facts to the arbitrator (e.g., the Curran affidavit) and in refusing to grant a reasonable opportunity for Commerce to adequately present its case before the arbitrator -- the instant award is not entitled to the usual presumption of correctness given to an arbitral award. Moreover, such award clearly may be set aside when it conflicts with (i) the literal terms of the NMU Agreement (see accompanying Memorandum of Law, pp. 18 - 20); (ii) the most basic strictures of anti-trust policy and statutory law borne of our constitution and

motions of private property (Memorandum of Law, pp. 21 - 26); and (iii) the provisions of the National Labor Relations Act (Memorandum of Law, pp. 27 - 29).

19. The arbitrator conceded that the challenges to the legality of the provision in question were beyond his purview, and he further stated at the arbitration hearing that he "expressed no opinion as to the merits" of the questions presented by the challenge to the provision legality, citing State v. Milk Handlers and Processors Ass'n, Inc., 52 Misc. 2d 658, 276 N.Y.S. 2d 803. aff'd 28 A.D. 2d 971, 283 N.Y.S. 2d 566 (1st Dept. 1966), as an instance in which members of the industry and the union were indicted for a criminal violation of the antitrust laws by reason of a contractual provision which the industry-wide arbitrator was required to, and did in fact enforce. Thus, this is the forum of first impression with respect to the legal challenges asserted against the enforceability of the coercive provisions of the NMU Agreement, and this Court is free to judge the merits of the legal challenge with the same latitude it would be permitted if the NMU's application for an injunction was sought pursuant to Rule 65 of the Federal Rules of Civil Procedure.

20. It must be obvious that in no sense of the traditional rules of pleading and practice has the NMU met the substantial burden required for the grant of injunctive relief. It has made, and can make, no showing of irreparable harm to it. On the other hand, both Vantage and Commerce, or one of the parties, stand to lose substantial otherwise unrecoverable financial benefits flowing from the transaction,

which both parties stand willing to perform. In fact, this clearly illegal attempt on the part of the NMU to force Commerce to sell its Vessel only to a member of the NMU club of operators might interrupt and interfere with the delicate financial rejuvenation of Vernitron which has been predicated, in part, upon the liquidation of Commerce.

21. By reason of the foregoing, it is respectfully requested that:

(a) Vantage be permitted to intervene in this proceeding;

(b) the application of the NMU for confirmation of the award of injunction be denied;

(c) that the restraining order previously obtained be vacated or, in the alternative, that the order be amended so as to require that the NMU post a security deposit in the amount of $2,750,000 (the purchase price of the BARBARA) in favor of Commerce, and a separate security deposit in favor of Vantage in the amount of the potential damages to Vantage as may be determined by this Court upon a hearing.

D. David Cohen

Sworn to before me this
8th day of February, 1971.

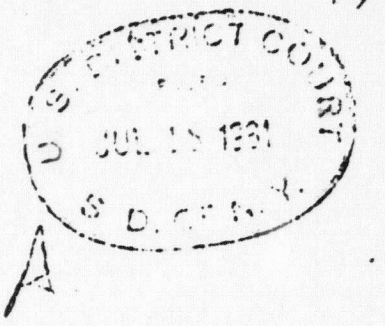
Notary Public

MICHAEL H. GRAHAM
Notary Public, State of New York
No. 30 [illegible] 30
Certificate filed in New York County
Term Expires March 30, 1972

EXHIBITS ANNEXED TO FOREGOING AFFIDAVIT

EXHIBIT 1 - AFFIDAVIT OF JOSEPH CURRAN

61 Civ 2347



UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- X

UNITED STATES OF AMERICA,

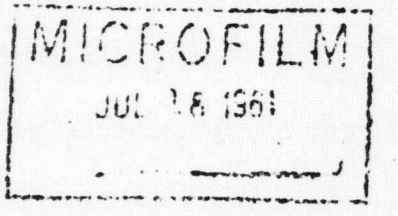
Plaintiff,

- against -

NATIONAL MARITIME UNION OF AMERICA, et al.,

Defendants.

- X



STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

JOSEPH CURRAN being duly sworn, deposes and says:

I am the President of the National Maritime Union of America, AFL-CIO. I submit this affidavit in opposition to the motion of the Sailors' Union of the Pacific (SUP) to punish Keystone Tankship Corp., Marine Transport Lines, Mathiasen's Tankers Industries and Joshua Hendy Corp. for contempt as a result of a change in companies operating United States Navy Tankers under contract with MSTS.

1.

THIS COURT LACKS JURISDICTION TO GRANT THE RELIEF SOUGHT BY SUP.

While SUP in form has made a motion to punish for contempt, it is clear that what it is seeking here is multi-form relief which will enable it to maintain control of specific jobs on specific vessels - a matter wholly extraneous to any question of contempt.

For one thing SUP is asking this Court in effect to declare that at least for the period of the temporary injunction it has a vested and unalterable right to represent the seamen presently employed on ten particular tankers regardless of a change in operating employers; and the seamen in turn are guaranteed their jobs and must be hired by the new employer regardless of what other contractual commitments it may have.

I will show later on that this will make a shambles of and represent a complete departure from established practice and custom in the maritime industry; will abrogate a firm working agreement between NMU and SUP that has been in effect and adhered to since World War II; and will be palpably destructive of NMU's tangible property rights as expressed and established in its collective bargaining agreements.

At this point, however, I want to emphasize, as I am advised by counsel, that any attempt by this Court to decree that SUP's representation rights run with the vessels would be an invasion of the field of exclusive jurisdiction reserved by Congress to the NLRB.

For plainly, such decree would involve the Court in the intricate and delicate problem of naming a bargaining representative for specific employees and specific vessels, and the equally intricate and delicate problem of designating appropriate bargaining units for specific employers. These functions, as has by now been indisputably established, are the sole and exclusive province of the NLRB. As was stated by Judge Parker in Amazon Cotton Mill Co. v. Textile Workers Union (4 Cir. 1948) 167 F. 2d 183, 186:

> "It is perfectly clear, both from the history of the National Labor Relations Act and from the decisions rendered thereunder, that the purpose of that act was 'to establish a single paramount administrative or quasi-judicial authority in connection with the development of federal American law regarding collective bargaining;' that the only rights made enforceable by the act were those determined by the National Labor Relations Board to exist under the facts of each case; and that the federal trial courts were without jurisdiction to redress by injunction or otherwise the unfair labor practices which it defined."

Indeed, so exclusive is the authority of the Board in the matter of designating bargaining representatives that very early in the Board's history the Supreme Court held that a certification by the Board of an exclusive bargaining representative is non-reviewable by the federal courts under the review provisions of the Labor Act. American Federation of Labor v. NLRB, 308 U.S. 401 (1940). The only manner in which such designation can be challenged is in an independent suit which will be entertained only on the very narrow ground that the Board has acted in "excess of its delegated powers and contrary to a specific prohibition of the Act." Leedom v. Kyne, 358 U.S. 184 (1958).

SUP contends that its rights are being destroyed, and that it is powerless to defend them because of the 80-day injunction. If SUP truly believes this, then ample recourse is available to it without violating the injunction. SUP may apply to the NLRB for such relief as it deems appropriate. One can be certain that if SUP did not descry a quick and easy short cut via the preliminary injunction, it would have been before the Board already.

SUP is very familiar with the processes of the Board, and its affiliate, SIU, has used them to notable advantage in at least two cases involving jurisdictional disputes with NMU. The Board under the broad powers vested in it by Congress even has authority to seek temporary injunctive relief on behalf of a party claiming that its rights under the Act are in jeopardy or being violated. The Board invoked such powers on behalf of SIU and against NMU in a case brought in this Court: Loudo v. American Coal Shipping Inc., 39 LRRM 2769 (1957) (not officially reported).

In Moore-McCormack Lines, Inc. (Robin Lines), NLRB Cases Nos. 2-RC-6095-72, the Board upheld SIU's right to carve out an eight-ship unit from an overall Moore-McCormack fleet represented by NMU. We believe that decision to be an aberrational one which will be rigidly confined by the Board to its facts. But aberrational or not, only the Board is empowered to make it. There can be no question that in the maritime industry fleet-wide representation by a single union is the prevailing and traditional rule; such unit is ordinarily the only appropriate unit; and historically for most employers (whether under NMU, SIU or SUP contract) it has been the only unit that has been recognized. The three employers in this case have always dealt with NMU exclusively as representative of their unlicensed seamen; and there is no history of split fleets among any of them.

The Board has frequently insisted on fleet-wide units where bargaining history supported it and declined to permit separate units for individual ships to be carved out. Ocean Tow, Inc., 99 NLRB 480 (1952). And in United States Lines, General Counsel Case No. M-60 (1957), the NLRB General

Counsel upheld the right of an NMU contract company to apply its fleet-wide agreement to four vessels purchased from an SIU contract company.

The foregoing, we believe, is sufficient to show that the Board has dealt with the problem presented here, and it alone has the administrative expertise (not to mention the primary exclusive jurisdiction) to resolve it. SUP's complaints, whatever they may be, with respect to the transfer of the tankers in question, should be placed in the hands of the Board where they belong.

2.

THE RULE IS ESTABLISHED AND OF LONG STANDING THAT THE UNION WHICH IS THE EXCLUSIVE BARGAINING REPRESENTATIVE OF AN EMPLOYER'S UNLICENSED SEAMEN AUTOMATICALLY REPRESENTS THE CREWS OF NEWLY-ACQUIRED VESSELS.

The maritime industry is a volatile one in which there is a constant stream of sales, exchanges and other types of transfers of vessels among employers. To preserve the principle of fleet-wide representation by a single union, indeed to preserve sanity in the industry, the rule inevitably followed is that the union with which an employer customarily deals is recognized automatically as bargaining representative for any newly-acquired vessels.

The collective bargaining agreements in the industry by their terms envision this. Thus the very first section of NMU's uniform agreement with tanker-operating companies provides:

> "Section 1. Collective Bargaining Agent. The Company in entering into this Agreement hereby recognizes the Union as the sole collective bargaining agent for the unlicensed

> personnel employed on board all United States-flag ocean-going vessels of the Company where the Company has recognized the Union as such agent. The Company also recognizes the Union as the sole collective bargaining agent for the unlicensed personnel employed by the Company on board all United States-flag ocean-going vessels owned by the Company or operated under bareboat charter or as General Agent of the United States, and/or which may be acquired as additions to its fleet of United States-flag ocean-going vessels or as replacements of the aforesaid vessels now operated by the Company."

SIU and SUP have similar all-embracing "recognition" clauses. These clauses would have no meaning or significance if a union's representation rights followed the vessel in a sale or transfer from one employer to another. For in such case the incumbent union could not be recognized as bargaining representative for "additions" to an employer's fleet unless such additions were wholly new vessels - and the recognition clause is not so qualified.

For this reason, a practice of long standing had developed among existing maritime unions that whenever a change of ownership or control in a vessel occurs, the union which customarily deals with the transferee or acquiring operator automatically succeeds to the status of bargaining representative.

Only a practice of this sort effectuates and complies with "recognition" clauses of the type quoted. In the past two and a half years at least twenty-one vessels of all types (passenger, freighter and tanker) have changed hands from an NMU contract company to an SUP or SIU contract company or vice versa. In each instance the union dealing with the acquiring employer automatically succeeded to the representation rights. One of these vessels was a major passenger line, the SS ATLANTIC,

which went from an SIU to an NMU company and alone involved some 300 jobs.

NMU's understanding with SUP in the matter of change-overs in operating companies dates back to World War II. At that time, I met in Washington with Harry Lundberg, SUP and SIU President, and Admiral Land of the United States Shipping Board, and expressly agreed to the arrangement that in all inter-company transfers, union representation would be determined by the contracts of the acquiring company. This agreement has been faithfully adhered to with very few exceptions of which the Robin Line case is the most notable one. And there it was the Labor Board that ordered the exception.

I do not believe that this Court, when it issued its preliminary injunction, intended to place any restrictions on the right of ship operators to engage in normal commercial transactions involving the sale, exchange or other type of transfer of a vessel. Certainly the language of the preliminary injunction in no way indicates this. I similarly do not believe that this Court intended to effect any changes with respect to practice and custom regarding union representation on vessels whose ownership or control changes hands. The language of the preliminary injunction gives no indication of this either. Nor did the Court, I am sure, intend to guarantee specific employment to specific seamen on specific vessels regardless of the change in circumstances of the vessels.

What this Court obviously sought to cover in the order was the usual situation where crew members upon issuance of the injunction, return to their former jobs for their former employers. In such case, the Court decreed, "the same rates of

pay, hours of labor, and other terms and conditions of employment as were in effect immediately prior to June 16, 1961" were to prevail. This language hardly underwrites unbroken and continuous employment on specific vessels, nor does it underwrite unbroken and continuous union representation for those vessels.

This Court's chief concern, as I am informed it stated in open court yesterday, was to insure that the American flag fleet sails. In this regard, I can assure the Court that NMU has more than ample manpower to staff the ten tankers involved and they can continue in operation with NMU crews without interruption of any kind.

Insofar as the Court by its preliminary injunction sought to preserve or restore the status quo, I believe it apparent that the status quo intended was the specific wage rates and other precise terms and conditions of employment on specific jobs of those employers who continue or resume operations. To go beyond this and extend the injunction so that it will constitute a guarantee of continuous employment and vested union representation in face of changed circumstances in the operation of a vessel is not a preservation of the status quo but rather is a radical and abrupt departure from it. Status quo in the case of an inter-company transfer of a vessel requires that the union of the acquiring company succeeds to the representation of the crews of the vessel.

REQUIRING THE SHIPPING COMPANIES INVOLVED IN THIS MOTION TO RECOGNIZE AND DEAL WITH SUP WOULD CONSTITUTE A CONFISCATION OF VALUABLE PROPERTY RIGHTS OF NMU.

NMU has been in continuous contractual relations with Keystone since 1944, with Marine Transport since 1941, and with Mathiasen's since 1951.

Collective bargaining agreements are the most valuable and essential property rights a labor union possesses. Without such agreements a union is a shell and has little, if any, excuse for continued existence.

I have already shown that one thing the existing uniform tankers agreement secures to NMU is recognition as bargaining representative for both existing vessels and after-acquired vessels. This preserves the integrity of the fleet-wide unit in addition to other benefits. If the Court should require NMU contract companies to recognize and deal with SUP in the traditional NMU unit, then, of course, the rights (and they are valuable property rights) accruing to NMU from the recognition clause are nullified.

An examination of the agreement will reveal other valuable rights and interests of NMU which would be similarly destroyed.

Thus, pursuant to Section 68 of the agreement, the companies are required on a fleet-wide basis to procure all unlicensed personnel needed to operate their vessels from NMU hiring halls where a very strict and rigidly controlled industry seniority and rotary hiring system is enforced. (Parenthetically, this system has been upheld as lawful and non-discriminatory by the NLRB in that it does not operate to favor union members as against non-members). If the companies whose contracts with NMU are at issue on this motion are required to deal with SUP in connection with personnel needs, then the employment provisions

in the NMU collective agreement will have been abrogated.

Similarly, as indicated by Sections 3 and 4 of the agreement, the companies bind themselves to contribute specific sums of money for each day worked by each seaman in their employ to jointly-trusteed multi-employer pension, welfare, employment security and vacation funds. The companies through their representatives participate in the operation of these funds as they are required to do under the Taft-Hartley Act. Any enforced recognition of SUP for the seamen in their employ would destroy the rights and benefits running to NMU and the seamen it represents by virtue of existing obligations of the companies to contribute to the operating NMU funds.

I respectfully urge this Court that due process and fairness requires that any limitation, forfeiture or usurption of NMU's established contract rights should take place only under the plenary processes of the NLRB, which is the only federal agency with the lawful authority, experience and training to regulate these matters. The NLRB alone through its quasi-judicial powers can satisfactorily and permanently resolve this problem with due regard for the rights and interests of all parties.

WHEREFORE, I respectfully request that the motion of SUP herein be in all respects denied.

Sworn to before me this
18th day of July, 1961.

H. HOWARD OSTRIN
Notary Public, State of New York
No. 41-[illegible] Queens County
Term Expires March 30, 1962

Joseph Curran

EXHIBIT 2 - AFFIDAVIT OF JOHN J. COLLINS

U.S. DISTRICT COURT
FILED
JUL 21 1961
S. D. OF N.Y.

A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- x

UNITED STATES OF AMERICA,

Plaintiff,

-against-

NATIONAL MARITIME UNION OF AMERICA, et al.

Defendants.

- x

OPPOSITION AFFIDAVIT
61 Civil 2347

JOHN J. COLLINS, being duly sworn, deposes and says:

I am Adviser to the Texaco Tanker Officers Association (hereinafter sometimes referred to as the "T.T.O.A.") duly appointed as such in accordance with its Constitution and By-Laws. I have been Adviser to the T.T.O.A. since its inception, ~~twenty~~ three years ago in 1938. In my capacity as Adviser I negotiate collective bargaining agreements on behalf of the T.T.O.A. together with the Executive Committee of the T.T.O.A., assist the Executive Committee in the administration of the collective bargaining agreements, and administer the affairs of the Association under the direction of the Executive Committee as an independent Adviser thereto. I am fully familiar with the facts hereinafter set forth.

I make this affidavit in opposition to the motion herein dated July 18, 1961, of the defendant, National Marine Engineers Beneficial Association (hereinafter sometimes referred to as "M.E.B.A.").

T.T.O.A. is an Independent Union

The T.T.O.A. is an independent, unaffiliated labor union, membership in which is confined to licensed deck and

engineer officers employed aboard the ocean-going American flag tankers of Texaco, Inc.

The T.T.O.A. originated in 1938 and was certified by the National Labor Relations Board acting under the Wagner Act as the exclusive collective bargaining representative for Deck and Engineer Officers in the Texaco fleet. Such certification followed an election conducted by the N.L.R.B.

During the more than twenty years of its existence, it has negotiated agreements with Texaco, Inc., covering wages, hours and working conditions for licensed officers in the Texaco fleet.

Annexed hereto as Exhibit A and made a part hereof is a report of the activities of the T.T.O.A. which report was prepared by me for the Executive Committee of the T.T.O.A. under date of May 25, 1961 and which report includes the following:

(a) History of the T.T.O.A.;

(b) Constitution and By-Laws of the T.T.O.A.;

(c) Current membership list of the T.T.O.A.;

(d) Financial statement of the T.T.O.A. for the past fiscal year ending January 31, 1961; and

(e) Agreement between The Texas Company Marine Department and the T.T.O.A. effective November 1, 1958 and an amendment thereto ("Memorandum of Understanding") dated January 11, 1960.

This is a voluntary union. There are no union shop provisions or any requirement that deck and engineering officers employed by Texaco must join the union. Nevertheless, the membership of T.T.O.A. has consistently comprised approximately 90% of the eligible permanently employed sea-going deck and engineer officers employed by Texaco. At the present time, the T.T.O.A. membership roster includes approximately 90% of those eligible.

The financial statement included in the report has been duly filed with the Secretary of Labor in accordance with the provisions of the Labor-Management Reporting and Disclosure Act of 1959.

The contention that T.T.O.A. is a company dominated union is utterly false.

Industry Practice on Purchase of Ships

During the past twenty-five years, I have been acting as an Adviser to independent unions in the maritime industry. I presently represent licensed officers in the Esso Standard fleet, licensed officers in the Socony-Mobil fleet, licensed officers in the Texaco fleet, licensed officers in the Tidewater fleet, east coast, licensed officers in the Cities Service fleet, unlicensed personnel in the Esso Standard fleet, unlicensed personnel in the Socony-Mobil fleet, unlicensed personnel in the Tidewater east coast fleet; two radio officer associations in Texaco and Esso, respectively, a stewards' organization in Esso and other independent tanker unions.

I have observed that where a company purchases a vessel, it is the customary and usual practice that the company man the vessel with a crew which is represented by the collective bargaining unit with which the fleet owner has a collective bargaining agreement. For example, to my knowledge I know of several instances where Esso and Socony over the past ten or fifteen years have sold ships; following such sale the crews were paid off from the vessel and were replaced by the new owner by crews covered by collective bargaining agreements which the new owner had. This did not result in any labor disturbances by way of picketing or otherwise and was considered to be in the normal course of events.

For example, recently, the Esso Annapolis was sold by Esso to American Trading and Production, Inc. This resulted in the crew of the Esso Annapolis being paid off and a new crew

being recruited on all bargaining levels in accordance with the terms of the agreement which the new owner had with other vessels in its fleet.

The action of the Texaco Company in manning the recently named S.S. Texaco Wisconsin with deck and engineering officers represented by T.T.O.A. was in accordance with this usual and customary practice.

This is a two way street. As a result of some purchases, T.T.O.A. men have been replaced by deck and engineering officers represented by Masters, Mates and Pilots and M.E.B.A. On the other hand on purchases by Texaco, Inc., the deck officers represented by Masters, Mates and Pilots and engineering officers represented by M.E.B.A. have been replaced by deck and engineer officers represented by T.T.O.A.

I am familiar with three such recent instances. Last year, the S.S. Greenpoint was purchased by Texaco, Inc. The deck and engineer officers under the prior ownership were represented by Masters, Mates and Pilots and M.E.B.A. and upon the sale were paid off of that vessel. Texaco, Inc. then renamed the vessel S.S. Texaco Nebraska and manned it with deck and engineering officers represented by T.T.O.A. Exactly the same thing happened early this year in the case of the S.S. Hunterspoint when T.T.O.A. deck and engineering officers replaced deck and engineering officers which had been represented by Masters, Mates and Pilots and M.E.B.A.

A recent instance in which T.T.O.A. deck and engineering officers were replaced by deck and engineering officers represented by Masters, Mates and Pilots and M.E.B.A. is the case of the former S.S. Texaco Wisconsin which was sold to Hedge Haven Farms, Inc.

Neither in the instance where the T.T.O.A. men were replaced nor in the instance where the M.E.B.A. and the Masters, Mates and Pilots men were replaced were any protests made by the displaced unions.

The M.E.B.A. now seeks an exception to this recognized industry practice although in the past they have recognized it and abided by it.

Prejudice to T.T.O.A. of Relief Sought

As has been pointed out, the T.T.O.A. has represented deck and engineering officers Texaco's (formerly The Texas Company) for the past twenty-three years. During this period, the collective bargaining agreement has always contained an agreement recognizing the T.T.O.A. as the exclusive bargaining agent for licensed deck and engineering officers and has been substantially in the form contained in the agreement presently effective which reads as follows:

> "The Company recognizes the Association as the exclusive bargaining agency for all Licensed Deck Officers, including Masters, and Licensed Engineers employed aboard the American Flag ocean-going vessels in active service owned and operated by the Company, for the purpose of collective bargaining with respect to rates of pay, wages, hours, and other conditions of employment provided, however, that any individual Officer or group of Officers shall have the right at any time to present grievances to the Company."

The Court may note that this agreement is presently effective and remains in effect to and including October 31, 1961 "and from year to year thereafter unless written notice to terminate or modify the agreement is given by either party to the other sixty (60) days prior to the anniversary date . . ." (Article XIX) (The entire agreement is set forth in Exhibit A)

To permit the M.E.B.A. to be the bargaining unit for the engineers would be a direct violation of this agreement and of course would cause the deck and engineering officers represented by the T.T.O.A. to lose their jobs on the S.S. Texaco Wisconsin.

The Court should not permit itself to be used as an instrument to compel Texaco, Inc. to break a collective bargaining agreement entered into in good faith which has been in existence for twenty-three years and which would result in officers presently employed, losing their positions on the vessel in question. Texaco in manning the new S.S. Texaco

Wisconsin with deck and engineering officers represented by the T.T.O.A. is acting in accordance both with its collective bargaining agreement with the T.T.O.A. and in accordance with the usual and customary practices in the industry. It should not be compelled to do otherwise.

Sworn to before me this
16th day of July, 1961.

Austin D. Graham

AUSTIN D. GRAHAM
Notary Public State of New York
No. 30-0529100
Qualified in Nassau County
Cert. filed with N. Y. Co. Clerk
Term Expires March 30, 1962

U.S. DISTRICT COURT FILED JUL 21 1961 S.D.C.F. Y.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

Plaintiff,

v.

NATIONAL MARITIME UNION OF AMERICA, et al.,

Defendants.

AFFIDAVIT

61 Civil 2347

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

M. E. LUNDFELT, being duly sworn, deposes and says:

I am Assistant General Manager of the Marine Department of Texaco Inc. I am fully familiar with the facts hereinafter recited and I make this affidavit in opposition to the motion herein of defendant National Marine Engineers Beneficial Association, dated July 18, 1961.

As shown immediately below, this motion raises the same issue as the unsuccessful motion of the Sailors' Union of the Pacific, based upon the transfer of operators of MSTS vessels, denied by this Court on July 18, 1961. Here, as on that motion, the complaint arises from the transfer of a vessel in the normal course of business where there is no basis for suggesting any attempt or intention to subvert this Court's injunction. Here, as there, the transfer is of a type which has taken place countless time

in the past with no picketing or strike action by the union displaced as a result of the change of ownership or operation of the vessel involved. In fact, no objection has ever been raised by any of the unions displaced that such transfer has occurred until the present effort to use the medium of this Court's injunction for this extraordinary and unfounded purpose.

As shown further below, the MEBA itself, has been involved in such transfers - in some cases benefitting by the transfer, in some cases being displaced - and in neither event has MEBA or other affected unions voiced the kind of protest which is now lodged.

The Facts Concerning the Transfer in Question

In July of 1959, Texaco Inc. acquired the stock of Paragon Oil Company, Inc., the assets of which included the tanker S.S. KINGSPOINT, as it was then known.

In October of 1959, the S.S. KINGSPOINT was bareboat chartered to Keystone Shipping Co. with the understanding that at any time when the vessel might be laid up in shipyard after June 15, 1961, the charter could be terminated.. The June 15, 1961 date was used because that was the expiration date of all Keystone collective bargaining agreements, including the agreement with the present complainant, MEBA.

Upon the transfer of the vessel from Paragon to Keystone under charter in 1959, the ship was crewed in accordance with the collective bargaining agreements of

Keystone with the various maritime unions. As is customary, Paragon paid off the crew with which it had operated and a new crew was signed on by Keystone under the terms of Keystone's applicable collective bargaining agreements. Thus, for example, although Paragon's agreement with MEBA had called for a complement of four assistant engineers, Keystone's complement included only three assistant engineers, which was in accordance with the terms of the Keystone contract with MEBA. (See affidavit submitted herewith on behalf of Keystone.) With the charter to Keystone, and the layup of two other American flag vessels hereinafter described, Paragon was left with no active vessels. Accordingly, Paragon's collective bargaining agreements with maritime unions became inoperative, and the Marine Department of Paragon, consisting of 18 employees, was dissolved in 1959.

On June 21, 1961, the S.S. KINGSPOINT was laid up at the Alabama Drydock and Shipbuilding Company, at Mobile, Alabama, at which time the entire ship's complement was paid off by Keystone. In accordance with the abovementioned understanding, which had been reached in 1959, Paragon terminated the charter with Keystone, effective June 23, 1961.

Arrangements were at this point made for the transfer of title from Paragon to Texaco. On June 26, 1961, the documentation was begun to accomplish this purpose, and title passed to Texaco on June 29, 1961, all prior to the institution of the present action.

In accordance with standard practice and its contractual obligations, Texaco then proceeded to place its own crew aboard the vessel, dealing with the respective

maritime unions with which this Company has had contractual relations for at least the past 20 years. Thus, for example, a new crew of unlicensed personnel was procured through the National Maritime Union. A radio officer belonging to the Texas Radio Officers Association was signed on pursuant to Article I - the "Recognition" clause of Texaco's contract with said union which reads as follows:

> "The Company recognizes the Association as the exclusive bargaining representative of all Radio Officer/Clerks employed aboard the American Flag ocean-going tankers in active service owned and operated by the Company, for the purpose of collective bargaining with respect to rates of pay, wages, hours, and other conditions of employment provided, however, that any individual Officer or group of Officers shall have the right at any time to present grievances to the Company."

Engineers and masters and mates were hired who were and are members of the Texas Tanker Officers Association. These hirings were made pursuant to Article I - the "Recognition" clause of Texaco's contract with the Texas Tanker Officers Association, which reads as follows:

> "The Company recognizes the Association as the exclusive bargaining agency for all Licensed Deck Officers, including Masters, and Licensed Engineers employed aboard the American Flag ocean-going vessels in active service owned and operated by the Company, for the purpose of collective bargaining with respect to rates of pay, wages, hours, and other conditions of employment provided, however, that any individual Officer or group of Officers shall have the right at any time to present grievances to the Company."

These steps followed precisely the established course which has been taken historically, without deviation and without protest, as illustrated by cases in the very recent past.

In the affidavit supporting the present motion of MEBA, Mr. Irving A. Lamy makes the surprising statement that but for the outstanding injunction of this Court in this case, MEBA "Would, in the normal course, take such necessary and lawful economic action as would be required to protect the jobs of its members." (Lamy affidavit, p. 3.) This is a nearly verbatim reproduction of the assertion of the Sailors' Union of the Pacific rejected by this Court on July 18, 1961, namely, the statement of Mr. William Armstrong in his affidavit of July 14 supporting that union's motion stating that his union, but for the injunction, "would have the right to take economic action to protect their jobs * * *." The present contention is erroneous for the reasons already stated by this Court with respect to the motion of the Sailors' Union and because of the facts immediately following.

Pursuant to a charter agreement executed on December 14, 1960, the Petrol Shipping Corporation granted an 18 year bareboat charter to Texaco Inc. of the tanker S.S. ATLANTIS. In its operations under the Petrol Shipping Corporation, the vessel had been staffed by a crew the respective members of which were represented by Masters, Mates and Pilots, the MEBA, the Radio Officers Union and the Seafarers International Union. In relinquishing the vessel to Texaco, Inc., Petrol Shipping Corporation followed the standard practice and paid off its crew. Early in December of 1960 Texaco proceeded to hire a crew for the vessel (the name of which was now changed to S.S. TEXACO OKLAHOMA). It staffed the vessel, as it always does, with

members of the National Maritime Union (replacing the seafarers International Union), the Texas Radio Officers Association (replacing the Radio Officers Union), and the Texas Tanker Officers Association (replacing MEBA and the Masters, Mates and Pilots). There were absolutely no objections to this accepted procedure by any of the displaced labor organizations. Most importantly, MEBA, which now states that it would "in the normal course," take "economic action" in such cases, took no such action of any kind, and made no protest.

To illustrate the opposite situation, where MEBA has, without protest or economic action by any labor organization, displaced another organization as a result of a transfer, I note the very recent case of the sale by Texaco Inc. of the tanker S.S. TEXACO WISCONSIN to Hodge Haven Farms, Inc. This sale was made just two months ago, on May 5, 1961, and following industry practice, Texaco Inc. paid off its crew on that date. The purchaser then proceeded to retain a new crew, dealing with the bargaining representatives with which it has contracts - namely, the Masters, Mates and Pilots and MEBA (replacing the Texas Tanker Officers Association), the Radio Officers Union (replacing the Texas Radio Officers Association), and the Seafarers International Union (replacing the National Maritime Union). Again, none of the displaced unions took any economic action whatever and no one protested, although MEBA now describes economic action in such cases as being "normal."

In its handling of the vessel formerly known as the S.S. KINGSPOINT (now the S.S. TEXACO WISCONSIN), Texaco Inc. has followed the procedure which had previously been

used in the cases of the two other American flag tankers formerly owned, directly or indirectly, by Paragon. At the time Texaco acquired Paragon's stock, wholly-owned subsidiaries of Paragon owned two T-2 tankers, the S.S. GREENPOINT and the S.S. HUNTERSPOINT. These vessels had been operated by another wholly-owned Paragon subsidiary, Circle Shipping Co., which had collective bargaining agreements with Masters, Mates and Pilots, MEBA, ARA and NMU. These vessels were laid up and the crews paid off on November 4, 1959. Title to these vessels thereafter passed to Texaco Inc. on March 7, 1960.

In August of 1960, the S.S. GREENPOINT, renamed the S.S. TEXACO NEBRASKA, was crewed up with members of the labor organizations with which Texaco Inc. has collective bargaining agreements.

On February 9, 1961, the S.S. HUNTERSPOINT, renamed the S.S. TEXACO KANSAS, was similarly manned. In these cases, as in all comparable situations, the MEBA, the MM&P and the ARA were displaced as a result of the change in ownership. In these cases, as in all others, the MEBA and the other displaced unions made no objection and took no economic action whatsoever.

In short, I respectively submit that MEBA is engaged in an unfounded attempt to employ the injunction of this Court as a vehicle for asserting claimed rights, and for accomplishing disruptive objectives, without any basis whatever in law or historical practice in the maritime industry. While MEBA purports to seek preservation of the status quo, its actual purpose is to alter completely the normal course of business and operations in this industry, which the Court's

injunction was designed to preserve. It is respectfully prayed that the motion of MEBA should in all respects be denied.

Sworn to before me this
19th day of July, 1961.

IRA H. LUSTGARTEN
Notary Public, State of New York
No.41-2429815 Queens County
Term Expires March 30, 1963

DECISION OF WYATT, U.S.D.J. ON FEBRUARY 19, 1971 (71 CIV.582) 55a
(Filed February 19, 1971)

NATIONAL MARITIME UNION OF AMERICA, AFL-CIO, Plaintiff
-v-
COMMERCE TANKERS CORPORATION, Defendant.

BEST COPY AVAILABLE

71 Civ. 582

This is a motion by Vantage Steamship Corp. (Vantage) for an order (a) permitting Vantage to intervene in this action, (b) denying an application by plaintiff for a permanent injunction, and (c) dissolving a temporary restraining order.

Defendant Commerce Tankers Corporation (Commerce) owns the tanker "Barbara". Commerce is a party to an agreement with National Maritime Union of America, AFL-CIO (NMU) under which NMU is the collective bargaining agent for unlicensed personnel of the Barbara; the period of the agreement is until June 15, 1972. This agreement contains a provision that if the Barbara is sold for operation under the United States flag, Commerce will obtain from the purchaser a written undertaking, for the benefit of NMU, that the agreement between NMU and Commerce will continue to apply to the operation of the Barbara and that the purchaser will comply with the said agreement - in other words, that NMU will continue to be the collective bargaining agent for the crew. The agreement provides for arbitration.

By agreement dated December 23, 1970, Commerce sold the Barbara to Vantage for $2,750,000, delivery of title to be on February 26, 1971. There is nothing in the Commerce-Vantage sales contract which obligates Vantage to observe the Commerce-NMU agreement. Apparently, if Commerce is unable to deliver by February 28 for reasons beyond its control, Vantage may not cancel until March 31, 1971. Vantage states that it has chartered the Barbara and must deliver it not later than March 5 1971.

If Commerce is able to sell the Barbara, Commerce will be out of the shipping business: it has no other vessels.

Vantage has other vessels and it was represented at oral argument that Vantage has an agreement with Seafarer's International Union (SIU) under which SIU is the collective bargaining agent for all crew members of all Vantage vessels. It is represented that Vantage cannot observe the Commerce-NMU agreement because, under the Vantage-SIU agreement, Vantage must deal with SIU as to any vessel it acquires.

Commerce and Vantage claim that the provision in the Commerce-NMU agreement as to sale of the Barbara is illegal as in violation of the antitrust laws and also as in violation of Section 8(e) of the National Labor Relations Act (29 U.S.C. § 158(e)) and

perhaps other sections of that Act.

MMU secured an arbitration award in its favor and against Commerce on February 8, 1971. The arbitrator found that the sales contract by Commerce was a violation of its agreement with MMU because the assurances of Vantage, as required by the MMU contract, were not obtained. This is the only possible finding that the arbitrator could have made. Commerce represents that the arbitrator refused to consider whether the contract provision was valid or not, ruling that he could only accept the contract at face value.

The award "enjoined and restrained" Commerce "from delivery" of the barbara to Vantage.

On February 9, MMU commenced this action against Commerce to enforce the award by an injunction of this Court. Jurisdiction is asserted under 29 U.S.C. § 185.

On the same day, February 9, I made an order requiring Commerce to show cause on February 16 why the award should not be confirmed and why Commerce should not be enjoined from transfer of the barbara to Vantage, unless there is compliance with the Commerce-MMU agreement. On notice to Commerce, there was a temporary restraining order against the transfer.

The motion of MMU was postponed by stipulation from February 16 to February 23.

This motion by Vantage was heard on February 16.

It seems clear that the motion of Vantage to intervene must be, and is, granted. Technically there is no "pleading setting forth the . . . defense" by Commerce, as required by Fed. R. Civ. P. 24(c). Vantage is allowed to intervene as a defendant and is directed to serve an answer not later than March 1, 1971.

It also seems clear that the motion of Vantage for a denial of the motion of MMU to enforce the award must be, and is, denied. The MMU motion will be on the motion calendar on February 23 and Vantage can make known its views at that time.

The remaining issue is whether the temporary restraining order should be dissolved.

Charges have been filed by Vantage with NLRB and those charges will at some point be decided by the NLRB. Those charges are beyond the proper cognizance of this Court, but a ruling by NLRB in favor of Vantage would affect the enforcement of the award by this Court.

Commerce and Vantage raise a serious question whether the provision in the Commerce-NMU agreement violates the antitrust laws. It is said to be one of first impression and that the provision itself first came into being in 1969. Certainly the provision restricts, in practical effect, the sale of the vessel to those United States flag operators who have agreements with NMU or to foreign flag operators. The vessel cannot be sold to anyone who, like Vantage, has an agreement with SIU or another Union. Commerce and Vantage ought to be able to litigate the issue.

On balance, I am persuaded that Commerce and Vantage will suffer from the restraining order much more than NMU will suffer if it is dissolved.

It is my intent that NMU be able, if it succeeds in the litigation, to be in the same position it would be in were the award to be presently enforced.

A sufficient bond will be posted to cover contributions to the NMU pension fund for the time the Barbara is not operated under the Commerce-NMU agreement.

An undertaking will be filed by Vantage that if NMU succeeds in this action, Vantage will put NMU in the same position it would have been in had the restraining order been continued, including representations by Vantage to the MLBs appropriate to the purpose.

Upon compliance with these conditions, the restraining order will be dissolved.

Settle order on notice, which may be short if reasonable.

Dated: February 19, 1971

INZER B. WYATT
United States District Judge

(Filed February 22, 1971)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- -x

NATIONAL MARITIME UNION OF AMERICA, AFL-CIO,

Plaintiff

-against-

COMMERCE TANKERS CORPORATION,

Defendant

and

VANTAGE STEAMSHIP CORP.,

Intervening Defendant

- -x

Index No. 71 Civil 582

UNDERTAKING

In compliance with a decision of Honorable Inzer B. Wyatt, United States District Judge, dated February 19, 1971, the undersigned, Vantage Steamship Corp., a New York corporation, having its principal place of business at 11 Broadway, New York, New York, the intervening defendant herein, does hereby undertake as follows:

If National Maritime Union of America AFL-CIO (hereinafter called "NMU") shall succeed in the above entitled action in obtaining a final confirmation of the award of the arbitrator permanently restraining and enjoining Commerce Tankers Corporation (hereinafter called "Commerce") from selling the SS BARBARA to any purchaser who does not comply with Article I Section 2 of the current Collective Bargaining Agreement between Commerce and NMU, the undersigned will put NMU in the same position for the remaining period of the said Collective Bargaining Agreement applicable to the SS BARBARA that it would have been in had the restraining order been continued.

Vantage undertakes that if NMU succeeds in
The undersigned represents to the National Labor
this action, Vantage will put NMU in the same position
Relations Board that the undersigned will not withdraw its
it would have been in had the restraint order been continued, and
charge alleging unfair labor practice under Section 8(e) of
representations by Vantage to the NLRB appropriate to the
the National Labor Relations Act and that the undersigned will
purpose
abide by any final determination of the National Labor Relations
Board relating to this matter.

IN WITNESS WHEREOF, the undersigned has executed this undertaking this 22nd day of February, 1971.

VANTAGE STEAMSHIP CORP.

By _____
President

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- -X

NATIONAL MARITIME UNION OF AMERICA, AFL-CIO,

Plaintiff,

- against -

COMMERCE TANKERS CORPORATION,

Defendant.

: 71 Civ. 582

: A N S W E R

- -X

Commerce Tankers Corporation, by its attorneys, Marshall, Bratter, Greene, Allison & Tucker, for its answer to the complaint herein alleges as follows:

FIRST: Admits the allegations contained in paragraph 1 of the complaint.

SECOND: Admits the allegations contained in paragraph 2 of the complaint.

THIRD: Admits the allegations contained in paragraph 3 of the complaint.

FOURTH: Denies the allegations contained in paragraph 4 of the complaint, except admits that the plaintiff and defendant entered into an agreement dated June 16, 1969 which provided in part that:

> "The Company in entering into this Agreement hereby recognizes the Union as the sole collective bargaining agent for the Unlicensed Personnel employed aboard all vessels of the Company where the Company has recognized the Union as such agent."

FIFTH: Admits that the defendant entered into a collective bargaining agreement and respectfully refers the Court to that agreement for the proof of the terms and conditions thereof.

SIXTH: Denies the allegations contained in paragraph 6 of the complaint, except admits that defendant has entered into a contract of sale for the Vessel SS. "BARBARA".

SEVENTH: Denies the allegations contained in paragraph 7 of the complaint, except admits that an arbitration between the parties was held and that an arbitral award was issued and respectfully refers the Court to that award for proof of the terms and conditions thereof.

AS AND FOR A FIRST
AFFIRMATIVE DEFENSE

EIGHTH: The award of the arbitrator should not be confirmed and should be vacated on the ground that the arbitrator exceeded his powers in making the award in that the collective bargaining contract provision construed by the arbitrator is in violation of the antitrust laws, on its face, is in violation of the antitrust laws as applied and construed; in that the provision is in violation of the National Labor Relations Act; and in that the arbitrator modified, changed and varied the terms of the contract between the parties.

AS AND FOR A SECOND
AFFIRMATIVE DEFENSE

NINTH: The award of the arbitrator should not be confirmed and should be vacated on the ground that enforcement of the arbitrator's award by injunctive relief or otherwise would result in enforcement of a contract in violation of the antitrust laws and the National Labor Relations Act.

AS AND FOR A THIRD
AFFIRMATIVE DEFENSE

TENTH: The matter before the Court is within the exclusive jurisdiction of the National Labor Relations Board.

AS AND FOR A COUNTERCLAIM

ELEVENTH: This Court's jurisdiction is based on 28 U.S.C. §1337. This action is instituted under Section 4 of the Act of Congress of October 14, 1914 (15 U.S.C. 15).

TWELFTH: Plaintiff and defendant entered into a collective bargaining agreement (the "Agreement"), dated June 16, 1969 and annexed to the complaint as Exhibit 1. The Agreement expires on June 15, 1972.

THIRTEENTH: Article I, Section 2 of the Agreement was included in the Agreement at the request and insistence of the plaintiff.

FOURTEENTH: Article I, Section 2 of the Agreement is in violation of the antitrust laws on its face and in violation of the antitrust laws as construed and applied in that Article I, Section 2 is in restraint of trade and diminishes competition in the sale of vessels subject to the Agreement with a consequent effect on prices.

FIFTEENTH: As a result of the foregoing, defendant has been restrained from the free alienation of its vessels.

SIXTEENTH: As a result of the foregoing, defendant has been damaged in an amount which cannot be determined at this time.

WHEREFORE, defendant Commerce Tankers demands judgment:

(a) Dismissing the complaint;

(b) Awarding defendant threefold the damages determined to have been sustained by them, together with the costs of suit, including a reasonable attorney's fee; and

(c) Such other and further relief as the Court may deem just and proper.

Dated: New York, New York
February 22, 1971

MARSHALL, BRATTER, GREENE,
ALLISON & TUCKER

By_____
A Member of the Firm
Attorneys for Commerce Tankers Corporation
Office and P. O. Address
430 Park Avenue
New York, New York 10022

AFFIDAVIT OF NED R. PHILLIPS IN SUPPORT OF PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION (71 CIV. 582)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

NATIONAL MARITIME UNION OF AMERICA, AFL-CIO,

Plaintiff

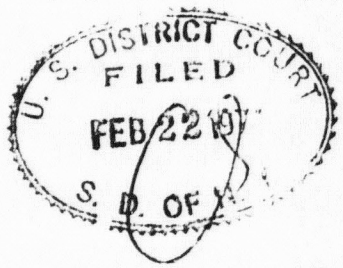
-against-

COMMERCE TANKERS CORPORATION,

Defendant

AFFIDAVIT OF NED R. PHILLIPS

71 Civ. 582



STATE OF NEW YORK)
)SS:
COUNTY OF NEW YORK)

NED R. PHILLIPS, being duly sworn, deposes and says:

1. I am an attorney at law associated with Abraham E. Freedman, counsel for the plaintiff, National Maritime Union of America, AFL-CIO, (NMU), and am fully acquainted with all of the prior proceedings heretofore had herein.

2. This affidavit is submitted in support of plaintiff's motion for a preliminary injunction pursuant to Rule 65(a) of the Federal Rules of Civil Procedure, restraining and enjoining defendant Commerce Tankers Corporation, (Commerce), from selling, transferring, or otherwise conveying its vessel, the S.S. "Barbara", to Vantage Steamship Corporation, (Vantage), or any other purchaser, without complying with Article I, Section 2, of the collective bargaining agreement between NMU and Commerce in accordance with the terms of an Award of Arbitrator Theodore W. Kheel, Esq., made pursuant to that collective bargaining agreement. The instant action has been brought to confirm that Award.

Background of the Arbitration Award

3. In June of 1969 NMU extended its collective bargaining agreements with the operators of various ocean going vessels, including defendant Commerce, for a period of three years from June 16, 1969 to June 15, 1972. The collective bargaining agreements provided, inter alia, as follows:

> "Article I, Section 2. Sale and Transfer of Vessels.
>
> (a) The Company agrees with respect to any vessel which is presently under or may hereafter come under this Agreement, that if during the term of this Agreement said vessel is sold or transferred in any manner to any other business entity not covered by this Agreement for operation under United States flag (but not including a vessel which the Company bareboat charters and the charter is terminated), said vessel shall be sold or transferred with the complement of employees who either are or shall be provided by the Union in accordance with the terms of this Agreement, or such number as may be agreed upon between the Union and the transferee. The term "transfer" shall be construed to include any chartering of a vessel by the Company.
>
> (b) The Company obligates itself to obtain for the benefit of the Union a written undertaking with the Union to be executed by the business entity to which the vessel has been sold or transferred that for the full term of the Agreement all of its terms and provisions shall apply to said vessel except as hereinabove provided and that said business entity will fully comply with all of the terms and provisions of this Agreement and any amendments thereto to preserve the jobs and job rights of the Unlicensed Personnel covered by this Agreement and to protect and maintain the wages, pension rights and other economic benefits and working conditions provided such personnel under this Agreement.

(c) The Company agrees that if it desires to sell, bareboat charter or in any manner whatsoever transfer a vessel to another business entity, whether for United States flag or Foreign-flag registry, timely written notice to the Union must first be given prior to any such sale or transfer.

(d) This Section shall be deemed of the essence of the Collective Bargaining Agreement and in the event of any violation, the no-strike provision of this Agreement shall not be applicable."

4. Upon information that defendant Commerce was contemplating the sale of one of its vessels, the S.S. "Barbara," to another American flag steamship company, a letter was sent to said defendant dated January 11, 1971, reminding them of their obligations under Article I, Section 2, of the collective bargaining agreement. (Said letter is annexed hereto, made part hereof, marked Exhibit 1.) At no time prior thereto had NMU been notified of Commerce's intention to dispose of the vessel as required by sub-paragraph (c) of Article I, Section 2.

5. By return mail, defendant admitted that a contract of sale for the "Barbara" had been entered into which called for delivery of the vessel on February 28, 1971. In this letter, Commerce indicated that it recognized its responsibilities under Article I, Section 2, and would comply with them. (A copy of said letter is annexed hereto, made part hereof, marked Exhibit 2.) Upon receipt of this letter, representatives of NMU contacted the intended purchaser, Vantage Steamship Corporation (Vantage) seeking to confirm that Vantage would recognize the NMU contract. Vantage, however, notwithstanding the assurances that had been given by Commerce, advised NMU that it had a contract with another union and would not recognize the NMU contract.

6. Vantage is party to a collective bargaining agreement with another union, the terms of which require it to recognize that union as the representative of all unlicensed employees aboard its vessels. Therefore, should the "Barbara" be transferred to Vantage, all of the jobs now held by members of the bargaining unit represented by NMU will be irretrievably and permanently lost to the bargaining unit, pension rights of the members of the bargaining unit will be adversely affected by the cessation of contributions which would otherwise have been made by reason of the continued employment aboard the vessel of these employees, and the NMU Welfare, Vacation and related plans similarly would be adversely affected.

7. Article I, Section 4, of the above mentioned collective bargaining agreement between NMU and Commerce sets forth a grievance and arbitration procedure. (A copy of the collective bargaining agreement is annexed hereto, made part hereof, marked Exhibit 3).

8. Pursuant to Article I, Section 4(e), of said collective bargaining agreement, Theodore W. Kheel, Esq., was duly designated Arbitrator to hear and determine all disputes arising thereunder.

9. On January 25, 1971, a telegram was sent to Mr. Kheel demanding immediate arbitration of the dispute which arose as a result of defendant's failure to comply with Article I, Section 2, of the contract.

10. By telephone and telegram Commerce requested that the arbitration be put off until after January 28, 1971, for the reason that their counsel was not then available. Accordingly, the arbitration was scheduled for February 8, 1971.

11. On the 8th day of February, 1971, at a time and place appointed, notice of which was given to both parties herein, the said Arbitrator heretofore named, subscribed to his oath of office and proceeded to hear the proofs of the parties. These proofs consisted, inter alia, of the letters heretofore identified as Exhibits 1 and 2, of the collective bargaining agreement, Exhibit 3, and the admission by Commerce that it had not complied with Article 1, Section 2, of the agreement. Thereafter, upon completion of his study of all of the facts, circumstances, elements and proofs entering into the controversy submitted to him, and after considering all of the evidence and arguments submitted by the parties, the Arbitrator issued an Award in writing duly acknowledged and dated the 8th day of February, 1971. (Annexed hereto, marked Exhibit 4, is a true copy of said Award).

12. True copies of the Award were duly delivered to deponent on the 8th day of February, 1971.

Prior Proceedings In This Court

13. On the following day, February 9, 1971, plaintiff NMU filed a complaint in this Court seeking (a) confirmation of the arbitrator's award; (b) a permanent injunction restraining and enjoining defendant from the sale of the S.S. "Barbara" without complying with Article I, Section 2, of the collective bargaining agreement, and (c) such other and further relief as might be proper under the circumstances. (A copy of the complaint is annexed hereto, marked Exhibit 5). At the same time, proceeding by Order to Show Cause, NMU sought a temporary restraining order enjoining the transfer of the "Barbara" pending a hearing on whether a preliminary injunction should issue. The application for a temporary restraining order came before this Court, the Honorable Inzer B. Wyatt presiding, on the afternoon of February 9, 1971. At that

time, both sides were represented by the counsel who had appeared before the arbitrator. Judge Wyatt granted the temporary restraining order and set argument on the motion for preliminary injunction for February 16, 1971. Thereafter, at the request of counsel for Commerce, by stipulation of the parties, which was approved by the Court, argument on the motion for a preliminary injunction was adjourned until February 23, 1971.

14. Notwithstanding the adjournment until February 23, 1971, which was agreed to at Commerce's request, on the morning of February 16, 1971, counsel for NMU received a notice by telegram that Vantage was, that morning, seeking an Order to Show Cause why it should not be permitted to intervene in the action and for relief in the form of dissolving the temporary restraining order which had been granted on February 9, 1971. Vantage's application for an Order to Show Cause was argued before Judge Wyatt on the afternoon of February 16, 1971, at which time Judge Wyatt signed the Order to Show Cause and set argument for the afternoon of February 18, 1971.

15. The argument on Vantage's application to intervene was heard by Judge Wyatt on February 18, 1971, as scheduled. At that time, Commerce filed an affidavit and memorandum of law in support of Vantage's application. Vantage had previously served a brief on the plaintiff at the time its Order to Show Cause was granted on February 16, 1971. At the argument before Judge Wyatt, plaintiff NMU submitted a memorandum of law in reply to Vantage's brief, but, not having been served with Commerce's brief and affidavit prior to that date, was unable to submit any papers in reply.

16. Upon completion of the argument of the parties on the afternoon of February 18, 1971, Judge Wyatt took the matter under advisement. Late in the afternoon of Friday, February 19, 1971, he made available to the parties his opinion on the issues

raised in Vantage's application. (A copy of this opinion is annexed hereto, marked Exhibit 6). The opinion contemplates that the temporary restraining order will be dissolved upon the compliance by the defendants with certain conditions, the details of which have not yet been determined and will not be determined until an order is settled. As of the time of the preparation of this affidavit, no such proposed order has been submitted, nor has any order been signed by Judge Wyatt.

17. Judge Wyatt's decision contemplates that, as a condition for dissolving the temporary restraining order, Vantage must provide adequate assurances that should NMU succeed in the action it will be put back in the same position that it would have been in if the restraining order had been continued, and would make appropriate representations to the National Labor Relations Board (NLRB) to this end. This reference to the NLRB stems from statements made by counsel for Vantage at the argument on the afternoon of February 18, 1971, that it had filed unfair labor practice charges against NMU with the NLRB, and that the NLRB would resolve the matter and was in a position to provide NMU with a full and complete remedy. This statement is not correct and is, in fact, misleading. It is clear that if NMU is successful in resisting the charges which Vantage has filed, the only relief which NMU will obtain from the Board is the dismissal of these charges. There will be no restoration of NMU's representation rights aboard the vessel by virtue of the unfair labor practice charges filed by Vantage. Moreover, once title to the vessel has been transferred, a new state of facts will exist so far as the Board is concerned which may result in a different

resolution of the issues than would result if the status quo is maintained and the vessel is not transferred. Accordingly, unless a preliminary injunction issues in conformity with the arbitration award, plaintiff and the seamen which it represents will be irreparably injured and without any adequate remedy at law or before the NLRB. Moreover, notwithstanding the statement by counsel for Vantage that it would make appropriate representations to the Board, it is abundantly clear that the Board is not bound by such representations in determining the appropriate bargaining unit and, in fact, such representations might even be construed themselves as an unfair labor practice. Judge Wyatt stated in his decision that it was his desire that NMU, if it succeeds in this litigation, should be in the same position it would have been were the award to be immediately enforced. Under the circumstances of this case, the only way that that intent can be accomplished is to restrain the transfer of the S.S. "Barbara" to Vantage.

18. Neither defendant will suffer irreparable harm if the sale is enjoined. Commerce may still sell the vessel to another purchaser who is in a position to recognize the NMU contract, and we have been advised that negotiations to this end actually are in progress. Vantage has an adequate remedy at law by a suit for damages against Commerce for breach of contract. For the reasons which are more fully set forth in plaintiff's brief in support of this application, the arguments raised by defendants that the contract provision is in violation of the Anti-Trust laws and Section 8(e) of the National Labor Relations Act are without merit. We submit plaintiff's right to confirmation of the arbitration award is clear and that, for the reasons pre-

viously stated, plaintiff will suffer immediate and irreparable injury if injunctive relief is denied.

19. Except as hereinabove stated, no other application for the relief herein requested has been previously made to this or any other Court.

WHEREFORE, deponent respectfully requests the Court to enforce the Award of the arbitrator and to enjoin the sale of the S.S. "Barbara" unless there is compliance with the provisions of the Union's collective bargaining agreement.

Ned R. Phillips

Sworn to before me this
23rd day of February, 1971

[illegible]

[illegible] JOHNSON, NOTARY PUBLIC
[illegible] OF NEW YORK [illegible]
[illegible] QUALIFIED [illegible] QUEENS COUNTY
[illegible] [illegible] MARCH [illegible]

EXHIBITS ANNEXED TO FOREGOING AFFIDAVIT

Ned Phillips
Gene Spector
Tal Simpkins

NMV - Commerce/Tankers

NATIONAL MARITIME UNION

Affiliated with the American Federation of Labor and Congress of Industrial Organizations

[illegible] EIGHTH AVENUE, NEW YORK, N.Y. 10011 · TELEPHONE 924-3900

REFER TO

January 11, 1971

Mr. Milton Pilalas, President
Commerce Tankers Corp.
% Empire Ship Agents & Brokers, Inc.
[illegible]00 Fifth Avenue
New York, New York 10036

Gentlemen:

It has come to our attention that you are contemplating the sale of the S/S BARBARA to another American-flag Steamship Company.

Your attention is directed to Article I, Section 2 of the Collective Bargaining Agreement which requires that you obtain from the purchasing company, as a condition of any such sale, an agreement that the Collective Bargaining Agreement shall continue to apply to the vessel.

Please advise at once by return mail whether you are in fact contemplating the sale of the vessel, if so to whom and what steps you are taking in compliance with the Collective Bargaining Agreement.

Very truly yours,

Mel Barisic
Vice President

M/H

cc: [illegible] Goodwyn

NEW YORK REPRESENTATIVE
EMPIRE SHIP AGENTS & BROKERS
500 FIFTH AVENUE

January 13, 1971

Mr. Mal Bariaic, Vice President
National Maritime Union of America
36 Seventh Avenue
New York, N. Y. 10011

Dear Mr. Bariaic:

In reply to your letter of January 11, 1971 addressed to me as President of Commerce Tankers Corporation, I wish to advise that our tanker "THALIA" was sold and delivered to Texas City Refining, Inc. on December 23, 1970, and further, that a Contract of Sale has been entered into for the "BARBARA" to the Vantage SS Corporation for delivery scheduled sometime in February.

Commerce Tankers Corporation is a wholly-owned subsidiary of Vermitron Corporation, and the final negotiations for the sale of these vessels were made directly between Vermitron Corporation and the buyers through the brokerage firm of Blix-Mallory & Company. For your guidance, at the start of negotiations for the sale of these vessels I advised Mr. Blix of Blix-Mallory & Company that the same unions, including NMU, with which Commerce Tankers Corporation had collective bargaining agreements must continue to man the vessels after their sale, and that this was to be made a condition of the sale; and he assured me that this was fully understood and would be imposed on prospective buyers. I know that the same unions are continuing on the THALIA and have no reason to believe that it will be otherwise with the BARBARA.

Very truly yours,

COMMERCE TANKERS CORPORATION

President

EXHIBIT 3 - AGREEMENT EFFECTIVE JUNE 16, 1969 THROUGH JUNE 15, 1972
BETWEEN VARIOUS TRANSFER COMPANIES & THE NMU

Effective 6/16/69 To 6/15/72 Between Various Tankers Co.s & the NMU

Exh 3 - Agreement Not Printed

EXHIBIT 4 - ARBITRATION OPINION AND AWARD

(Omitted here but printed at p. 3a)

EXHIBIT 5 - COMPLAINT

(Omitted here but printed at p. 1a)

EXHIBIT 6 - DECISION OF WYATT, U.S.D.J.

(Omitted here but printed at p. 55a)

ORDER OF WYATT, U.S.D.J. ON FEBRUARY 22, 1971 (71 CIV. 582)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

(Filed February 22, 1971)

NATIONAL MARITIME UNION OF AMERICA, AFL-CIO,

Plaintiff,

-against-

COMMERCE TANKERS CORPORATION,

Defendant.

-and-

VANTAGE STEAMSHIP CORP.,

Intervening Defendant.

U.S. DISTRICT COURT FILED FEB 22 1971 S.D. OF N.Y.

Index No. 71 Civil 582

ORDER

A motion by Vantage Steamship Corp. (hereinafter called "Vantage") pursuant to Rule 24 A of the Federal Rules of Civil Procedure for an order: (a) that it be permitted to intervene in this proceeding; (b) that the application of National Maritime Union of America, AFL-CIO (hereinafter called "NMU") for an order permanently restraining and enjoining the transfer, sale or conveyance of the SS "BARBARA" to Vantage be denied in all respects; (c) that the outstanding order restraining Commerce Tankers Corporation (hereinafter called "Commerce") from selling the said vessel to Vantage be dissolved; and (d) that Vantage have such other and further relief as to this Court may seem just and proper having duly come on to be heard before this Court by Order to Show Cause issued on February 16, 1971.

NOW, upon reading the said Order to Show Cause dated February 16, 1971, the Affidavit of P. T. Corletto verified the 16th day of February, 1971, and the Affidavit of David Cohen verified the 16th day of February, 1971 in support of the said motion, and an Order to Show Cause dated February [illegible], 1971

and the Affidavit of N. R. Phillips verified the 8th day of February, 1971 in opposition to the said motion and, on the 18th day of February, 1971, Vantage having appeared before this Court by Martin C. Seham of Messrs. Surrey, Karasik, Greene & Seham and by Eli Ellis of Messrs. Hill, Betts & Nash and Commerce having appeared by Richard L. Bond of Messrs. Marshall, Bratter, Greene, Allison & Tucker and NMU having appeared by Charles Sovel of the law firm of Abraham E. Freedman, it is, on motion of Hill, Betts & Nash and Surrey, Karasik, Greene & Seham, attorneys for Vantage;

ORDERED, that the motion of Vantage for leave to intervene as a defendant is granted and Vantage is directed to serve an answer to the complaint herein not later than March 1, 1971; and it is further

ORDERED, that the motion of Vantage for a denial of the motion of NMU to enforce the award of the arbitrator which permanently restrained and enjoined the transfer, sale or conveyance of the said vessel to Vantage by Commerce be denied at this time but ~~Vantage may renew its motion and make the facts known at the time that the NMU motion will be on the motion calendar of this Court on February 25, 1971;~~ this is not a decision on the merits; and

~~A BOND HAVING BEEN FILED~~ Upon the posting of a bond in the sum of $278,361 to cover contributions to the NMU Pension Fund for such time up to June 15, 1972 as the BARBARA is not operated under the Commerce-NMU Collective Bargaining Agreement; and

VANTAGE HAVING FILED an undertaking in this Court that, if NMU succeeds in this action in obtaining a final confirmation of the award of the arbitrator permanently restraining and enjoining Commerce from selling the SS BARBARA to any purchaser who does not comply with Article I, Section 2 of the current

Collective Bargaining Agreement between Commerce and NMU, Vantage will put NMU in the same position for the remaining period of the said Collective Bargaining Agreement applicable to the SS BARBARA, that it would have been in had the restraining order been continued, which undertaking includes representations by Vantage to the NLRB that it will not withdraw its charge alleging unfair labor practice under Section 8(e) of the National Labor Relations Act and that it will abide by any final determination of the National Labor Relations Board relating to this matter.

IT IS FURTHER ORDERED that the temporary restraining order contained in the Order to Show Cause dated February 9, 1971 enjoining and restraining Commerce from delivering the said vessel to Vantage or any other purchaser without complying with Article I, Section 2 of the said Collective Bargaining Agreement, be and the same ~~hereby~~ is dissolved upon the posting of the bond provided for above.

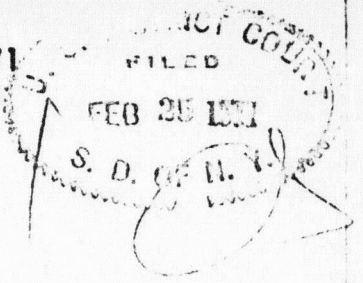
Dated; New York, New York

February 22, 1971

Inger B Leggett

U. S. D. J.

ORDER OF FRANKEL, U.S.D.J. ON FEBRUARY 24, 1971
(71 CIV. 582) (Filed February 25, 1971)



UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

NATIONAL MARITIME UNION OF AMERICA, AFL-CIO,

Plaintiff,

-against-

COMMERCE TANKERS CORPORATION,

Defendant,

-and-

VANTAGE STEAMSHIP CORP.,

Intervening Defendant.

Index No. 71 Civil 582

ORDER

Plaintiff having moved by Order to Show Cause for an Order confirming the award of arbitrator Theodore W. Kheel, Esq., dated February 8, 1971, which enjoined defendant Commerce Tankers Corporation from transferring its vessel, the S/S "Barbara", to Vantage Steamship Corp., or any other purchaser, without complying with the provisions of Article I, Section 2 of the collective bargaining agreement between the National Maritime Union and Commerce Tankers Corporation, and for an injunction enforcing said award and said motion having duly come on to be heard before this Court on February 23, 1971, at which time plaintiff appeared by Abraham F. Freedman, Esq., Charles Sovel of counsel, Commerce Tankers Corporation appeared by Messrs. Marshall, Bratter, Greene, Allison & Tucker, Charles H. Miller of counsel, and Vantage Steamship Corp. appeared by Messrs. Hill, Betts & Nash and Messrs. Surrey Karasik, Greene & Geham, Martin C. Schum of counsel, and it having been stipulated by the parties that the Court might treat the motion as one for a preliminary injunction after having moved the Court for entry of such Order pending determination of the motion,

NOW, upon hearing the arguments of the parties, and upon the motion of Abraham E. Freedman, attorney for plaintiff, it is

ORDERED, that pending the determination of plaintiff's motion for a preliminary injunction, defendant Commerce Tankers Corporation be and hereby is enjoined and restrained from transferring its vessel, the S/S "Barbara", to Vantage Steamship Corp., or any other purchaser, without complying with Article I, Section 2 of the collective bargaining agreement between the National Maritime Union and Commerce Tankers Corporation, and it is further

ORDERED, that plaintiff shall post security in the amount of $10,000.00.

Dated: New York, New York
February 24, 1971
6:30 P.M.

Maurice E. Frankel
U.S.D.J.

SUPPLEMENTAL ORDER OF FRANKEL, U.S.D.J. ON FEBRUARY 25, 1971 (71 CIV. 582) (Filed February 25, 1971)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

FILED IN COURT
FEB 26 1971
JF

NATIONAL MARITIME UNION OF AMERICA, AFL-CIO,

Plaintiff,

- against -

COMMERCE TANKERS CORPORATION,

Defendant,

- and -

VANTAGE STEAMSHIP CORP.,

Intervening Defendant.

Index No. 71 Civ. 582

COUNTER PROPOSED ORDER

Plaintiff having obtained an order to show cause signed by The Honorable Inzer B. Wyatt of this Court on February 9, 1971 which order:

(a) brought on plaintiff's motion for an order confirming the award of arbitrator Theodore W. Kheel, Esq., dated February 8, 1971, which enjoined defendant Commerce Tankers Corporation from transferring its vessel, the S/S "BARBARA", to Vantage Steamship Corp., or any other purchaser, without complying with the provisions of Article I, Section 2 of the collective bargaining agreement between the National Maritime Union and Commerce Tankers Corporation, and for an injunction enforcing said award, and

(b) contained a temporary restraining order enjoining and restraining Commerce Tankers Corporation

from transferring its vessel, the S/S "BARBARA", to the Vantage Steamship Corp., or any other purchaser, without complying with Article I, Section 2, of the collective bargaining agreement between the National Maritime Union of America and Commerce Tankers Corporation, and

Vantage Steamship Corp. having moved on February 16, 1971 by order to show cause for, inter alia, an order

(a) granting Vantage Steamship Corp. leave to intervene in civil action 71 Civ. 582 and

(b) vacating the temporary restraining order obtained by plaintiff, and

Judge Wyatt having rendered a decision on February 19, 1971 granting Vantage Steamship Corp.'s motion for leave to intervene and vacating the temporary restraining order upon the filing of an undertaking by Vantage Steamship Corp. and a bond, and

Judge Wyatt having signed an order on February 22, granting Vantage Steamship Corp. leave to intervene and vacating the temporary restraining order upon the posting of an undertaking by Vantage Steamship Corp. and a bond in the sum of $278,361., and

Plaintiff's motion brought on by the order to show cause of February 9, 197 having duly come on to be heard before this Court on February 23, 1971, at which time plaintiff appeared by Abraham E. Freedman, Esq., Charles Sovel of counsel, Commerce Tankers Corporation appeared by

Messrs. Marshall, Bratter, Greene, Allison & Tucker, Charles H. Miller of counsel, and Vantage Steamship Corp. appeared by Messrs. Hill, Betts & Nash and Messrs. Surrey Karasik, Greene & Seham, Martin C. Seham of counsel, and

It having been stipulated by the parties that the Court might treat the motion as one for a preliminary injunction, and

Plaintiff having moved the Court for entry of a temporary restraining order pending determination of the motion,

NOW, upon hearing the arguments of the parties, and upon the motion of Abraham E. Freedman, attorney for plaintiff, it is

ORDERED, that pending the determination of plaintiff's motion for a preliminary injunction, defendant Commerce Tankers Corporation be and hereby is enjoined and restrained from transferring its vessel, the S/S "BARBARA", to Vantage Steamship Corp., or any other purchaser, without complying with Article I, Section 2 of the collective bargaining agreement between the National Maritime Union and Commerce Tankers Corporation, and it is further

ORDERED, that plaintiff shall post security in the amount of $ 10,000.

Dated: New York, New York
February 24, 1971

Marvin E. Frankel
U. S. D. J.

This supersedes TRO signed 2-24-71.
9:15 P

(Filed March 1, 1971)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- -X

NATIONAL MARITIME UNION OF AMERICA, AFL-CIO,

Plaintiff,

-against-

COMMERCE TANKERS CORPORATION,

Defendant,

-and-

VANTAGE STEAMSHIP CORP.,

Intervening Defendant.

- -X

Index No. 71 Civ. 582

A N S W E R

VANTAGE STEAMSHIP CORP., Intervening Defendant, by its attorneys, HILL, BETTS & NASH and SURREY, KARASIK, GREENE AND SEHAM, answering the Complaint herein, alleges:

1. Admits the allegations contained in Paragraph 1 of the Complaint.

2. Denies sufficient knowledge or information thereof to form a belief as to the allegations contained in Paragraph 2 of the Complaint.

3. Denies the allegations contained in Paragraph 3 of the Complaint.

4. Denies sufficient knowledge or information thereof to form a belief as to the allegations contained in Paragraph 4 of the Complaint.

5. Admits the allegations contained in Paragraph 5 of the Complaint.

6. Denies the allegations contained in Paragraph 6 of the Complaint except admits that the Defendant, Commerce Tankers Corporation, entered into a contract for the sale of the vessel BARBARA to the Intervening Defendant.

7. Denies the allegations contained in Paragraph 7 of the Complaint except admits that, on February 8, 1971, an arbitration award was made by Theodore W. Kheel in which the said Arbitrator restrained and enjoined the Defendant from selling the vessel BARBARA to the Intervening Defendant or any other purchaser without complying with Article I, Section 2 of the collective bargaining agreement.

FOR A FIRST AFFIRMATIVE DEFENSE

8. The collective bargaining agreement which the Arbitrator purported to enforce is illegal and invalid because it is in violation of Antitrust laws and the National Labor Relations Act.

FOR A SECOND AFFIRMATIVE DEFENSE

9. The enforcement of the alleged award of the Arbitrator is within the exclusive jurisdiction of the National Labor Relations Board.

FOR A COUNTERCLAIM

10. This Court's jurisdiction is based on 28 U.S.C. Section 1337. This action is instituted under Section 4 of the Act of Congress of October 14, 1915 (15 U.S.C. Section 15).

11. The Intervening Defendant is a New York corporation having its principal place of business at 11 Broadway, New York, New York.

12. The Intervening Defendant is engaged in the business of owning and operating U.S. vessels in coastwise and foreign commerce and in buying and selling vessels for use in coastwise and foreign commerce.

13. Plaintiff allegedly entered into a collective bargaining agreement (the "Agreement") with the Defendant dated June 16, 1969 which expires June 15, 1972, a copy of which agreement is annexed to the Complaint as Exhibit "1".

14. Article I, Section 2 of the Agreement is in violation of the Antitrust Laws on its face.

15. On information and belief, Plaintiff imposed its will on the Defendant and through economic pressure forced the Defendant to agree to the terms of Article I, Section 2 of the Agreement.

16. Plaintiff has used Article I, Section 2 of the Agreement to prevent the Defendant from selling the vessel BARBARA to the Intervening Defendant or to anyone who does not have a collective bargaining agreement with the Plaintiff or who refuses to enter into a collective bargaining agreement with the Plaintiff and, specifically, has restrained the Defendant from selling the vessel BARBARA to the Intervening Defendant.

17. The vessel BARBARA is a United States flag vessel, Official No. 248079, of about 15,158 gross and 10,632 net registered tons.

18. On December 23, 1970, the Intervening Defendant entered into a written contract with the Defendant pursuant to which the Defendant agreed to sell and the Intervening Defendant agreed to buy the vessel BARBARA for a total purchase price of $2,750,000.

19. In reliance upon the Contract of Sale, the Intervening Defendant entered into a charter party with Standard Oil Company of California providing for the charter of the vessel BARBARA for 365 days at a charter hire rate of $10.35 per deadweight ton per month, which amounts to $271,863.45 per month and $3,262,361.40 for the charter period.

20. The anticipated net earnings from the said charter party would be about $2-million.

21. The cancelling date under the said charter party is March 5, 1971.

22. By reason of Plaintiff's actions in forcing the Defendant to agree to the terms of Article I, Section 2 of the Agreement and in enforcing Article I, Section 2 of the Agreement, the Intervening Defendant has been and will be damaged to the extent of at least $2-million plus possible claims by Standard Oil Company for their damages for breach of the Charter Party.

WHEREFORE, the Intervening Defendant demands judgment against Plaintiff:

(a) dismissing the complaint;

(b) awarding the Intervening Defendant threefold its damages, together with the costs of suit, including reasonable attorneys' fees; and

(c) such other and further relief as the Court may deem just and proper.

Dated: New York, New York
March 1, 1971

HILL, BETTS & NASH

By _____
A Member of the Firm

Attorneys for
VANTAGE STEAMSHIP CORP.

Office & Post Office Address
26 Broadway
New York, New York 10004

SURREY, KARASIK, GREENE AND SEHAM

By _____
A Member of the Firm

Attorneys for
VANTAGE STEAMSHIP CORP.

Office & Post Office Address
500 Fifth Avenue
New York, New York 10036

OPINION OF FRANKEL, U.S.D.J. ON MARCH 2, 1971 (71 CIV. 582)
(Filed March 2, 1971)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- x

NATIONAL MARITIME UNION OF AMERICA, AFL-CIO,

Plaintiff,

-against-

COMMERCE TANKERS CORPORATION,

Defendant.

- x

71 Civ. 582

OPINION

A P P E A R A N C E S :

Abraham E. Freedman, Esq.
New York, N.Y.
Attorney for Plaintiff
Charles Sovel, Esq.
Ned R. Phillips, Esq.
Of Counsel

Marshall, Bratter, Greene, Allison & Tucker, Esqs.
New York, N.Y.
Attorneys for Defendant
Charles H. Miller, Esq.

Of Counsel

Hill, Betts & Nash, Esqs.
and
Surrey, Karasik, Greene and Seham, Esqs.
New York, N.Y.
Attorneys for Intervenor
Martin C. Seham, Esq.
Fred C. Klein, Esq.
Eli Ellis, Esq.
John F. Lang, Esq.
Of Counsel

FRANKEL, D.J.

Under its collective agreement with the plaintiff, National Maritime Union of America (NMU), covering the three years ending June 15, 1972, the defendant, Commerce Tankers Corporation, promised not to transfer either of its two ships unless the purchaser agreed to assume the obligations of the union contract. Nevertheless, without informing the Union, defendant, in December 1970, contracted to sell its ship SS Barbara, but exacted no promise from its purchaser to honor the NMU agreement. Upon learning of the proposed transfer, the NMU moved promptly to demand arbitration under the collective agreement. Defendant sought and obtained delays it may now come to regret; its request for still further delay was rejected by the Union. The experienced permanent arbitrator designated by the parties in their agreement held that the proposed transfer of the ship was forbidden, and he enjoined it. Now, resisting enforcement of the award, the defendant tenders a variety of trivial objections along with a relatively substantial argument that its collectively bargained obligation is void and unenforceable because it violates the antitrust laws. The proposed transferee of the vessel, Vantage Steamship Corp., has been permitted to intervene, and it

likewise argues that the disputed contract provision and the arbitral award thereunder must be nullified. The court, acceding to requests that it move speedily - requests pressed with special urgency by the defendant and the intervenor because of their imminent contract deadlines - has come to the conclusion that defendant's obligation is valid, subsisting and properly enforced by the award of the arbitrator. Accordingly, the Union's application for a preliminary injunction, which may well amount in practical effect to a final decision, will be granted.

The contract provision upon which the NMU relies, Article I, Section 2, reads this way:

> "(a) The Company agrees with respect to any vessel which is presently under or may hereafter come under this Agreement, that if during the term of this Agreement said vessel is sold or transferred in any manner to any other business entity not covered by this Agreement for operation under United States flag (but not including a vessel which the Company bareboat charters and the charter is terminated), said vessel shall be sold or transferred with the complement of employees who either are or shall be provided by the Union in accordance with the terms of this Agreement, or such number as may be agreed upon between the Union and the transferee. The term 'transfer' shall be construed to include any chartering of a vessel by the Company.
>
> "(b) The Company obligates itself to obtain for the benefit of the Union a written undertaking with the Union to be executed by the business entity

to which the vessel has been sold or transferred that for the full term of the Agreement all of its terms and provisions shall apply to said vessel except as hereinabove provided and that said business entity will fully comply with all of the terms and provisions of this Agreement and any amendments thereto to preserve the jobs and job rights of the Unlicensed Personnel covered by this Agreement and to protect and maintain the wages, pension rights and other economic benefits and working conditions provided such personnel under this Agreement.

"(c) The Company agrees that if it desires to sell, bareboat charter or in any manner whatsoever transfer a vessel to another business entity, whether for United States flag or Foreign-flag registry, timely written notice to the Union must first be given prior to any such sale or transfer.

"(d) This Section shall be deemed of the essence of the Collective Bargaining Agreement and in the event of any violation, the no-strike provision of this Agreement shall not be applicable."

Having no doubt about the meaning of this provision, defendant decided last October to sell its two vessels. It sold one in December and contracted later in the same month for sale to the intervenor of its remaining ship, the Barbara. Defendant said nothing to the NMU about this. It made no effort to seek relief either in the form of some concession by the Union or in a declaratory or other judicial proceeding when there was time to press at relative leisure the claim that

the plain obligations of defendant to honor and preserve its NMU contract were somehow void and unenforceable. Instead, defendant proceeded in secret, and, on December 23, 1970, executed its contract for sale of the vessel and delivery on February 28, 1971, to the intervenor.[1] That contract contained no provision of the kind defendant was obliged to obtain requiring compliance by the purchaser with the subsisting collective bargaining agreement.

On or about January 11, 1971, the NMU learned that there might be a sale of the Barbara. It wrote promptly to defendant, reported its information that defendant was "contemplating" such a sale, reminded defendant of the requirement for preservation of the collective agreement, and requested appropriate information and assurance.

In a response on January 13, seemingly inaccurate if not intentionally misleading, defendant acknowledged

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1. It bears emphasis that under the collective agreement defendant had promised that "if it desire[d] to sell, bareboat charter or in any manner whatsoever transfer a vessel to another business entity, * * * timely written notice to the Union must first be given prior to any such sale or transfer."

that it had made a contract for sale of the Barbara; acknowledged, too, its contractual duty to preserve the collective agreement; and supplied the following double-talk on this key point:

> "Commerce Tankers Corporation is a wholly-owned subsidiary of Vernitron Corporation, and the final negotiations for the sale of these vessels were made directly between Vernitron Corporation and the buyers through the brokerage firm of Blix-Mallory & Company. For your guidance, at the start of negotiations for the sale of these vessels I advised Mr. Blix of Blix-Mallory & Company that the same unions, including NMU, with which Commerce Tankers Corporation had collective bargaining agreements must continue to man the vessels after their sale, and that this was to be made a condition of the sale; and he assured me that this was fully understood and would be impressed on prospective buyers. I know that the same unions are continuing on the THALIA and have no reason to believe that it will be otherwise with the BARBARA."

Actually, of course, defendant knew, or carefully insulated itself from learning, that it would "be otherwise with the BARBARA."

The Union wasted no time asking defendant's purchaser and learning that its contractual rights would not be assumed or recognized after the sale. On January 25, 1971, the NMU demanded arbitration of its resulting dispute with defendant. Defendant requested and was granted a postponement to February 8. A request for a further adjournment was refused.

On February 8, 1971, following the plain terms of the contract between the NMU and defendant, the arbitrator held illegal and enjoined the proposed sale unless the purchaser acknowledged the contract rights of the NMU. A day later, the NMU brought this suit to enforce the award. Judge Wyatt granted a temporary restraining order on February 9. Then, on further consideration triggered by the intervenor, Judge Wyatt, on February 19, concluded that the restraint should be dissolved, and he entered an order to that effect on February 22, the day before argument of the instant motion, conditioned upon posting of a bond in the amount of $278,361.[2] Judge Wyatt also granted the motion of Vantage to intervene, allowing this company until March 1, 1971, for the filing of its answer. In dissolving his initial temporary restraining order Judge Wyatt indicated as his grounds, first, a belief that there was a "serious question" under the antitrust laws, and, second "[o]n balance, * * * that Commerce and Vantage [would] suffer from the restraining order much more than NMU [would] suffer if it [was] dissolved." At the

2. After full argument on February 23, and apprised that transfer of the vessel was scheduled to be accomplished by February 28 (Sunday), this court revived the temporary restraint by orders of February 24 and 25.

same time, of course, Judge Wyatt noted the pendency of the instant motion, and observed that his views on the temporary restraining order would leave open for independent consideration the matters now being decided.

II.

Defendant's (and intervenor's) main point, and the only one of substance, is that the provision for preserving the three-year collective bargaining agreement against nullification by sale of the vessel must be treated as void because it violates the antitrust laws. The court has studied (again) the authorities thought to sustain this view. The demand for speed overcomes the wish to write in scholarly detail. It must suffice to outline briefly the court's reasons for rejecting the argument.[3]

The aim of a union to preserve jobs for its members and to prevent decimation of its ranks by transfer or sale of employer operations is among the most familiar forms of "action * * * in the union's self-interest in an area which is a proper subject of union concern * * *."

3. The arbitrator here, as has been done in other cases, refrained from ruling on the antitrust issue, leaving it for the judicial determination now being made. Defendant says the very existence of such an issue rendered the arbitrator powerless to proceed at all. The argument rests upon a misreading of precedent too plain to require more discussion.

Intercontinental Container Tr. Corp. v. New York Ship. Ass'n, 426 F.2d 884, 887 (2d Cir. 1970). The legitimacy of this concern is clear even in the absence of a contractual arrangement implementing it. "The objectives of national labor policy, reflected in established principles of federal law, require that the rightful prerogative of owners independently to rearrange their businesses and even eliminate themselves as employers be balanced by some protection to the employees from a sudden change in the employment relationship." John Wiley & Sons v. Livingston, 376 U.S. 543, 549 (1964). As the cited case shows, this familiar aspect of "national labor policy" has had the consequence of binding even "an unconsenting successor" (id. at 550) to important obligations accepted by the predecessor employer. It is entirely in keeping with that same policy to recognize the right of a union to seek (and obtain if it can) an agreement that its contractual rights and status will not be terminated before the agreed expiration date through the unilateral decision of the employer to sell his plant or a substantial portion of it or, as here (what amounts to the same thing), his single remaining ship. That is all we have here, despite strings of citations to wholly different problems of antitrust conspiracy.

Accordingly, the short answer to defendant's main point is that the disputed contract provision "falls within the protection of the national labor policy and is therefore exempt from the Sherman Act." Meat Cutters v. Jewel Tea Co., 381 U.S. 676, 690 (1965). See also United Mine Workers v. Pennington, 381 U.S. 657 (1965); Intercontinental Container Tr. Corp. v. New York Ship. Ass'n, 426 F.2d 884 (2d Cir. 1970); National Dairy Prod. Corp. v. Milk Drivers & Dairy Emp., 308 F. Supp. 982 (S.D.N.Y. 1970).[4]

III.

In further opposition to the Union's claim, it is contended, most strenuously by the intervenor, that the restriction in the collective agreement violates the so-called "hot cargo" provision in §8(e) of the National Labor Relations

4. Defendant argues that the illegality in the questioned restriction is somehow indicated because it applies only to ship sales to American, not foreign, buyers. This is a curious argument in a way; a limited restraint would seem normally less objectionable on account of the limitation rather than more. The point is not of great interest, however. The NMU has shown extensively the practical problems explaining the limitation. The Union, obviously, would have preferred a broader provision had it been workable. The limits of what was agreed upon are of no help now to defendant's effort to avoid the obligation altogether.

Act, as amended, 29 U.S. C.§158(e).[5] By way of threshold refutation, the Union makes the cogent point that this is a topic for the exclusive competence of the N.L.R.B. rather than the court. See, e.g., San Diego Building Trades Council v. Garmon, 359 U.S. 236 (1959). The defendant, along with others in the shipping industry, has had 20 months or so in which to seek the Labor Board's authoritative judgment as to whether the disputed provision of the June 1969 agreement is unlawful. Having foregone that leisurely and appropriate course, the companies here seek what would amount to a ruling in their favor (and the most decisive kind of relief) in a tribunal which was not given initial or reviewing authority on the subject.

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5. "It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforcible and void * * *."

In any event, the court draws assurance for rejection of this point from its own appraisal of §8(e). Granting this to be less authoritative than the view the Labor Board may ultimately take,[6] the court concludes that the contract restriction in question is outside the statute, in which, as the Supreme Court recently affirmed, "Congress * * * had no thought of prohibiting agreements directed to work preservation." Woodwork Manufacturers v. NLRB, 386 U.S. 612, 640 (1967).

Other arguments from the law administered by the N.L.R.B. are less intelligible and less seemingly weighty. The intervenor reviews at length Labor Board learning about the desirability of "fleet-wide bargaining units" into which vessels constituting "accretions" are to be incorporated. Special reliance is placed upon Moore-McCormack Lines, Inc., 139 N.L.R.B. 796 (1962). But in that very decision the Board made clear that the existence of "two

6. The intervenor has brought a Labor Board proceeding against both defendant and the NMU. Of course, if the court were to deny the relief the NMU seeks pending the Board's proceeding, the result would be an effective and only partially curable defeat for the Union. For in the absence of the relief being granted today, the ship and the jobs for NMU members would be transferred away.

bargaining units among [a single] Employer's unlicensed seamen [need not be considered] an insuperable obstacle to effective collective bargaining." Id. at 799. As to the effects of transfers upon an incumbent union, wholly apart from the kind of agreement for that contingency made by the parties herein, the Board merely cautioned that its decision was "not to be construed as indicating that in the future the transfer of a ship from one owner to another will necessarily preserve the existing bargaining unit or the status of the incumbent Union." Id.

It is not easy to understand how the intervenor finds help in that decision. The Board said (in the absence of any contract agreeing to such a result) that it might well (as it did in that very case), but not "necessarily," preserve the incumbent union's status upon transfer of a vessel. That does not remotely suggest that a contract assuring such preservation could be thought illegal.

Finally, to give the subject more than it deserves, the intervenor seems mistaken in its apparent premise that rules defining appropriate bargaining units may or should be read to outlaw work-preserving agreements.

IV.

There are some quibbles about the arbitrator's procedure and about the substance of his decisions. The attack upon his construction of the contract is frivolous; the question is patently outside the scope of judicial consideration. The claim that the arbitrator acted too speedily is not more imposing. Defendant kept the Union in the dark concerning its sale plans until the eleventh hour. Then it strove, with some success, to delay the arbitration. There was compelling reason for a swift decision. And the question of contract interpretation was a fairly simple one.

To show otherwise, defendant and the intervenor say that a strike was the only remedy for the breach asserted by the NMU, and that the arbitrator therefore exceeded his powers in granting an award in the nature of an injunction. In other words, defendant, selling its last ship without obtaining the assurance of continued incumbency it owed the NMU, concedes to the Union and the men the exclusive right to refrain concertedly from working at jobs they would no longer have. Arguments this frivolous are liable to lead courts erroneously to overlook better ones.

In any event, the arbitrator's authority to choose an appropriate remedy, like his power to construe the contract and govern his own procedures, was exercised well within the bounds in which his judgments are final and unreviewable. Cf. John Wiley & Sons v. Livingston, supra, 376 U.S. at 552-59; United Steelworkers v. American Mfg. Co. 363 U.S. 564, 567-69 (1960).

V.

The court concludes in sum that this is in overwhelming probability a case for confirmation of the arbitrator's award. The genuine issues appear to be only issues of law. The grounds for opposing the award are, with one exception, unsubstantial. As to that exception, the court is prepared on the materials before it to rule for the Union.

There are reasons of at least a technical nature, however, for postponing a formally final decision on the motion to confirm. Another judge of the court has granted a motion for intervention and authorized the filing of an answer by the intervenor. That answer had not been filed when the present motion was argued, and is not before the court as this is written.

In addition, defendant says it needs discovery on its antitrust contentions. This is put in the vaguest terms, and it is deeply unpersuasive. Nevertheless, the thought has not received full consideration, and there is no need today to rule finally upon the propriety of proposed discovery proceedings.

Mindful of such loose ends, the court, with the acquiescence of the parties, has treated the instant proceeding as an application for an injunction pendente lite restraining transfer of the Barbara until final resolution of the proceeding to confirm the arbitral award. And the decision herein will be to grant such "temporary" relief. Judging from everything the parties say, the practical effect may well be final; the contract for sale of the vessel and the intervenor's obligation to deliver it to a charterer are due for execution hours from now (or may be, in some respects at least, possibly overdue already). Nevertheless, we are calling the relief sought and granted "preliminary" for at least the reasons already sketched.

Concentrating upon this - and upon the fact that the award to be enforced is itself injunctive in nature - defendant and the intervenor have devoted much

argument to "weighing the equities," calculating in large numbers their monetary loss if they are barred from executing the sale transaction arranged in the teeth of defendant's agreement with the NMU. Against this, they attempt to show that the Union's loss is modest and easily compensable if they are allowed now to go ahead with their deal. The analysis, upon full reconsideration, is not impressive. Apart from the fact that injunctive relief, as the seasoned arbitrator determined, is the only kind truly effective and what defendant must be deemed to have bargained for, the equities favor the NMU and disfavor the companies by a heavy preponderance. If the defendant may simply shuck off the vessel and the collective agreement, the position of the Union (and its members) can never be restored or be accurately compensated for in money terms. The companies have deemed that hurt fully curable by their offer of a bond to make up lost pension and welfare constributions should the Union ultimately win. That treats the union as some sort of business devoted to the filling of its treasury and its "funds." Whether or not unions alway cleave to their ideals, this is scarcely their nature or the measure of their legal rights. Omitted from the reckoning is the heart of the matter - the interest in "the preservation of work" for its members, Intercontinental

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Container Tr. Corp. v. New York Ship. Ass'n, supra, 426 F.2d at 887, as well as union power - which the companies here do not even try to reckon in dollar terms.

On the other side of the coin, we have only the regrettable but unappealing sorrow of self-inflicted wounds. As its briefs here show, defendant decided last October to sell its ships. It contracted for the instant sale in December. It deliberately neglected to tell the Union what was happening. It refrained from seeking either a dispensation or a test of a union refusal to waive the contract restriction. Even when the NMU made clear its position, defendant stalled and delayed an arbitral decision. The result has been a state of crisis, allegedly impending disaster and, perhaps less importantly, a demand for undeliberate and inconvenient speed in these court proceedings. The further result has come to be a preliminary injunction which may not be subject to the always desirable benefit of appellate review whereas a nisi prius decision timely sought might well have had such scrutiny.

This kind of avoidable emergency cannot weigh ponderously in a court of equity.

The equities of the intervenor can rise no higher. It knew or should have know what it was doing and

what it was risking. It is, moreover, a stranger to the NMU. The Union's rights are not to be denied or postponed or diminished because such a party has in such a way stationed itself in the path of their enforcement.

Upon similar reasoning, the court, when it issued a temporary restraining order on February 25, 1971, required a bond in the amount of only $10,000. The requirement will remain the same under the order now to be issued.

For the reasons stated, defendant, its officers, agents, attorneys and employees should be, and they are, enjoined and restrained pending the final decision in this case from selling or transferring the SS Barbara to any person or company unless there has been compliance with Article I, Section 2, of the collective bargaining agreement; provided, that the plaintiff shall post a bond in the sum of $10,000 for the payment of such costs and damages as defendant may be found to have incurred should this injunction be determined hereafter to have been issued wrongfully.

It is so ordered.[7]

Dated: New York, New York
March 2, 1971

Marvin E. Frankel
U.S.D.J.

7. There has been no focus by the parties upon the proper terms of an injunctive order if one was to be issued. While the problem does not seem complex, it is one upon which the court would welcome adversary views. At the same time, the court has sought to expedite the matter so that if there is any practical opportunity for appellate review, that should not be lost. Accordingly, if either side is troubled by the terms of the brief order embodied herein, the court invites submissions on short notice seeking changes deemed appropriate or

(71 CIV.582) (Filed March 4, 1971)

DISTRICT COURT FILED MAR 4 1971 S. D. OF N.Y.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

NATIONAL MARITIME UNION OF AMERICA, AFL-CIO, Plaintiff, -against- COMMERCE TANKERS CORPORATION, Defendant, -and- VANTAGE STEAMSHIP CORP., Intervening Defendant.	Index No. 71 Civil 582 ~~PROPOSED~~ ORDER

Plaintiff having moved by Order to Show Cause for an Order confirming the award of arbitrator Theordore W. Kheel, Esq., dated February 8, 1971, which enjoined Defendant Commerce Tankers Corporation from transferring its vessel, the S/S "Barbara", to Vantage Steamship Corp., or any other purchaser, without complying with the provisions of Article I, Section 2 of the collective bargaining agreement between the National Maritime Union and Commerce Tankers Corporation, and for an injunction enforcing said award, and said motion having duly come on to be heard before this Court on February 23, 1971, at which time Plaintiff appeared by Abraham E. Freedman, Esq., Charles Sovel of counsel, Commerce Tankers Corporation appeared by Messrs. Marshall, Bratter, Greene, Allison & Tucker, Charles H. Miller of counsel, and Vantage Steamship Corp. appeared by Messrs. Hill, Betts & Nash and Messrs. Surrey, Karasik, Greene and Seham, Martin C. Seham of counsel, and it

having been stipulated by the parties that the Court might treat the motion as one for a preliminary injunction,

NOW, upon hearing the arguments of the parties, and upon the motion of Abraham E. Freedman, attorney for Plaintiff, it is

ORDERED, that Plaintiff's motion for a preliminary injunction is granted; and it is further

ORDERED, that pending the final decision in this case, defendant, its officers, agents, attorneys and employees, are enjoined and restrained from selling or transferring the S/S "Barbara" to Vantage Steamship Corp., or any other purchaser, without complying with Articles I, Section 2 of the collective bargaining agreement between the National Maritime Union and Commerce Tankers Corporation; and it is further

ORDERED, that Plaintiff shall post a bond in the amount of Ten Thousand ($10,000.00) Dollars for the payment of such costs and damages as defendant may be found to have incurred should it hereafter be determined that this injunction was wrongfully issued.

Dated: New York, New York

March 4, 1971

Marvin E. Frankel

U.S.D.J.

ORDER TO SHOW CAUSE BY DEFENDANT TO RESETTLE ORDER (71 CIV.582)
(Filed March 19, 1971)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

NATIONAL MARITIME UNION OF AMERICA, AFL-CIO,

Plaintiff,

- against -

COMMERCE TANKERS CORPORATION,

Defendant,

- and -

VANTAGE STEAMSHIP CORP.,

Intervening Defendant.

----------X

Index No. 71 Civil 582

ORDER TO SHOW CAUSE

for

Upon the annexed affidavit of D. David Cohen, sworn to on the 17th day of March, 1971, let the plaintiff and the intervening defendant show cause before Judge ~~Marvin E. Frankel~~ on the 23rd day of March, 1971, at 10:00 o'clock why a resettled order in the form annexed hereto should not be signed and entered, and it is

Ordered that ~~Let~~ service by 4 o'clock on the 18 day of March, 1971 upon counsel for the plaintiff and intervening defendant be deemed good and sufficient service.

Dated: New York, New York
March 18, 1971

/s/ Marvin E. Frankel
U. S. D. J.

AFFIDAVIT OF D. DAVID COHEN IN SUPPORT OF MOTION (71 CIV.582)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- X

NATIONAL MARITIME UNION OF AMERICA, AFL-CIO,

Plaintiff,

- against -

COMMERCE TANKERS CORPORATION,

Defendant,

- and -

VANTAGE STEAMSHIP CORP.,

Intervening Defendant.

- X

AFFIDAVIT

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

D. DAVID COHEN, being duly sworn, deposes and says:

1. I am Assistant Secretary of Commerce Tankers Corporation ("Commerce") and corporate counsel to Vernitron Corporation ("Vernitron"), the parent company of Commerce. This affidavit is submitted in support of the motion of Commerce to resettle the order of Judge Marvin E. Frankel of this Court in the form annexed to this affidavit as Exhibit "A".

2. I recognize that this matter has been an imposition upon this Court's time and I do not lightly

come before the Court again, especially for relief which I believe to be implicitly included within the provisions of the injunction order signed by Judge Frankel on March 4, 1971.* However, we must once again seek the Court's assistance because the intervenor defendant Vantage Steamship Corporation ("Vantage") reads Your Honor's decision otherwise and by its words and deeds is seeking to create a situation which can both be economically disastrous to Commerce and at the same time deprive the National Maritime Union of America, AFL-CIO ("NMU") of the fruits of its legal victory.

3. At the present time, the Vessel Barbara is in the Port of Mobile, Alabama, where, although ready for sale, transfer, hire or other disposition, it lies idle -- as a result of the intervention of Vantage which asserts a right to purchase the Vessel without providing the undertaking which this Court has determined to be necessary for any transfer. Vantage and its attorneys have asserted in letters to Justice Saul Streit of the Supreme Court of the State of New York and to Commerce its position that only Commerce is bound by the injunction of this Court and that Vantage stands ready, willing and able to purchase the Vessel Barbara without complying with the terms of the NMU collective bargaining agreement. The letters of John F. Lang, Esq., of Hill, Betts & Nash and of P. T. Corletta, the President of Vantage, to this effect, are annexed hereto as Exhibits "B" and "C" respectively.

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* This proposition is given further support by the fact that Judge Frankel did not sign the proposed counterorder of Vantage which would have prohibited the sale of the Vessel Barbara to any purchaser.

4. Moreover, upon information and belief, Vantage has threatened and continues to threaten potential transferees of the Vessel and parties willing to charter hire the Vessel with legal action against such party and against the Vessel on the premise that Vantage has an ownership interest in the Vessel and is ready, willing and able to purchase it and is not subject to the injunctive order of the Court.

5. In short, Vantage claims that it is entitled to specific performance of the contract of sale relating to the Vessel Barbara without Vantage assuming the NMU crew or NMU collective bargaining agreement. In a telephone conversation on Wednesday evening, March 10, Mr. Lang told me that Vantage could and would, in fact, perform the purchase of the Vessel without providing an NMU undertaking and that Vantage in so doing would not be in contempt of the injunctive relief already afforded to the NMU by this Court.

6. The publication by Vantage of its position that it is free to take the Vessel Barbara despite this Court's injunction, has made it impossible for Commerce to utilize, or charter, or sell the Vessel in any fashion, all at a considerable and continuing loss and at peril to the financial soundness of Commerce's parent, Vernitron Corporation.

7. Commerce recognizes that it has a serious dispute with Vantage. We believe that we will be able to

show beyond any doubt that the actual wrongdoer in this situation is Vantage. After Vantage first stated, on February 9, 1970, that it would not provide the NMU undertaking required under the collective bargaining agreement, Commerce immediately, on February 10, 1971, noticed an arbitration with Vantage pursuant to the arbitration provision contained in the contract of sale. On February 20, 1970, Vantage moved in the Supreme Court of the State of New York for the County of New York to stay such arbitration on the ground that no arbitrable dispute existed. On the eve of the original return date for the petition to stay, Vantage indicated its willingness to enter into "alternative arrangements" to commit the Vessel Barbara to fulfill the existing charter commitments which were made to Standard Oil of California ("SoCAL") "without disrupting existing collective bargaining arrangements." On that basis, Vantage sought and obtained two adjournments of the petition to stay the arbitration while the challenge to the legality of the NMU provision was proceeding in this Court. At the present time Commerce is pursuing its contractual right for an arbitration of the dispute, and Vantage, through the most devious methods, is seeking to stall or avoid arbitration of the dispute.

8. I do not intend to air Commerce's entire dispute with Vantage before this Court. In fact, my prior affidavit dated February 18, 1971 expressly avoided the substance of the factual dispute between Vantage and Commerce. In view of subsequent actions of Vantage and

the untenable situation in which Commerce has been placed, it is essential that this Court have a full understanding of how the instant situation developed.

9. The business reorganization of Commerce's parent company required that the Vessels - valuable assets of a public corporation - be sold at the highest possible price to any bidder. The task of securing such bidders and in closing the transaction had to be undertaken by Mr. Herman S. Nathanson ("Nathanson"), the newly elected President of the Corporation, and your deponent, because the principal officer of Commerce, who was familiar with the maritime industry was one of the offerors for the Vessels. Neither Nathanson nor I had any prior experience in the shipping industry, and no knowledge of the bitter rivalry between the competing unions nor of the unusual NLRB rule which has been referred to hereinbefore as the "fleet-wide" principle. All of Vernitron's independent nogotiations for the sale of the Vessels were carried forward with the express understanding that the transferees would undertake the burden of Commerce's collective bargaining arrangements and the written offer for the ship contained such a requirement. Commerce's special counsel in connection with the sale of the Vessels included in the draft of the contract of sale a form of undertaking required by the NMU. After negotiating for nearly eight months without objecting to the condition that the same unions be continued, Vantage at the eve of contract requested that the union undertaking be omitted

so that the Seafarers International Union ("SIU") could have an opportunity to compete for the role of collective bargaining representative for the seamen on the Barbara. Mr. Corletta asserted that Vantage and its attorneys were prepared to undertake the entire burden of curing any labor problem which would arise, and on that basis induced Commerce to omit from the Contract of Sale the usual provision permitting the Seller to freely cancel in the event of any labor difficulty. No disclosure was made by Vantage, until this Court demanded it, that in no circumstance could Vantage undertake the NMU.*

10. Vantage's entire course of conduct and our sole limited experience in the shipping industry led us to believe that Vantage was fully capable of curing any labor problem by the simple device of contracting with the proper union. The concurrent buyer of the Vessel Thalia - Texas City Refining, Inc. had two different subsidiaries, and the different subsidiaries had contracts with NMU and SIU, respectively. In fact, Commerce was advised that the contract signed on behalf of Vantage was at all times

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* In fact, Vantage's current statement to that effect is in direct conflict with the undertaking provided by Vantage to this Court at the request of Judge Wyatt on February 22, 1971. The undertaking, a true and complete copy of which is annexed hereto as Exhibit "D" hereof, provides, in pertinent part, that "if NMU shall succeed . . . in obtaining a final confirmation of the award of the arbitrator . . . [Vantage] will put NMU in the same position for the remaining term of the Collective Bargaining Agreement applicable to the S.S. Barbara that it would have been in had the restraining order been continued."

In reliance upon that undertaking, Commerce was prepared to transfer the Vessel to Vantage if so permitted by this Court. Did Vantage intend simply to flaunt its promises to this Court if the transfer of the Vessel had occurred prior to the confirmation of the award?

intended to be assigned to a sister corporation, Pioneer Maritime Corporation, which, upon information and belief, does not now and never has had a contract with the SIU.

11. Commerce entered into the contract of sale in reliance upon Vantage's representations that plaintiff Vantage would meet the labor problem head-on. Neither Commerce nor Vernitron made a "secret" of the sale of the Vessel Barbara. The transaction was reported in the public press and an extensive story on the matter appeared in the Wall Street Journal. Upon information and belief, it was also widely reported in maritime industry trade media, including the Journal of Commerce, and the buyer was readily identified as Vantage.

12. My first hint that anything was awry came on the morning of January 25 when I received a telephone call from Mr. Phillips, an attorney for the NMU, who urgently demanded an immediate arbitration. Because of a serious illness in my family, and only for that reason, I requested a brief adjournment in the arbitration, which was adjourned to February 8, 1971 as a result of the arbitrator's own schedule.

13. When I returned to the office on January 28, inquiry was made as to the status of the Vessel Barbara. I was advised by Nathanson and Mr. Bernard Levine that there had been telephone conversations with representatives of Vantage on January 25, 26 and 27 and that in those

telephone conversations Vantage repeated its precontract assurances that the "problem" would be taken care of by Vantage once the Vessel arrived in a U. S. Port, and Vantage requested "that the matter be left to its attorneys" who were allegedly knowledgeable of the field; but that Mr. Corletta has expressed some anxiety that the seamen on the Barbara might strike while the Vessel was still in Spain.

14. I was personally disturbed at the ambiguity of the Vantage representations in view of the union's notice of arbitration. Commerce requested an immediate meeting to ascertain Vantage's course of action. Vantage asked that the meeting be held on February 4th at its offices. At that meeting, Vantage disclosed for the first time that it had no plan of action to comply with or lawfully avoid the NMU collective bargaining agreement. We were astounded and suggested that the agreement be cancelled so that Commerce could be free to sell to a buyer ready and willing to undertake the NMU. Vantage refused, and stated that it intended that the burden of delivery was upon Commerce, irrespective of the obstacles which might be placed by the NMU.

15. At that meeting Vantage suggested that the problem could be cured by a "special arrangement" with the NMU for the benefit of its pension fund. Thus, on the next day, February 5, Commerce sought, at Vantage's instance, to obtain the consent of the NMU, citing the special circumstances relating to our going out of the shipping business,

and the conduct of Vantage leading up to that point in time. We had no desire to test the legality or illegality of the restrictive provisions of the NMU collective bargaining agreement. We are in the present lawsuit solely because NMU and Vantage have asserted that Commerce is bound to take conflicting courses of action.

16. Commerce has not sought and does not now seek unfair advantage over either Vantage or the NMU. When Vantage was unable to meet the union problem which it either underestimated or misrepresented to Commerce, Commerce was willing to cancel the contract of sale without penalty to Vantage. Commerce also apprised Vantage of its right to assign the contract to a buyer ready and willing to undertake the NMU. Furthermore, Commerce was willing to devote the Vessel Barbara, without prejudice to the contractual rights of either Commerce or Vantage, to SoCAL Charter. Vantage refused all of those options ** and, in fact, its unlawful and unreasonable conduct is one of the reasons why the Vessel Barbara is not now on charter to SoCAL.

17. The conclusion is inescapable that Vantage is attempting to preserve a spurious and dishonest claim

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** Rescinding its threats vis-a-vis SoCAL only hours after the expiration date of SoCAL's offer to charter the Vessel.

against Commerce by delaying and avoiding arbitration while at the same time interfering with any transfer of the Vessel to any third party. All Vantage's maneuvers are designed to impose an economic burden upon Commerce and its parent company so grievous that Commerce will be induced to purchase Vantage's cooperation in the sale, transfer or chartering of a vessel that belongs solely to Commerce.

18. No previous application for the relief sought herein has been made.

WHEREFORE, your deponent respectfully requests that the resettled order annexed to this affidavit as Exhibit "A" be signed and entered.

D. David Cohen

Sworn to before me this
17th day of March, 1971

Grace E. Valconi
Notary Public

GRACE E. VALCONI
NOTARY PUBLIC, State of New York
No. 41-9019350
Qualified in Queens County
Certificate filed in New York County
Commission Expires March 30, 1972

EXHIBITS ANNEXED TO FOREGOING AFFIDAVIT

EXHIBIT A - PROPOSED RESETTLED ORDER

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

NATIONAL MARITIME UNION OF AMERICA, AFL-CIO, Plaintiff,	Index No. 71 Civil 582
- against -	PROPOSED RESETTLED ORDER
COMMERCE TANKERS CORPORATION, Defendant,	
- and -	
VANTAGE STEAMSHIP CORP., Intervening Defendant.	

Plaintiff having moved by Order to Show Cause for an Order confirming the award of arbitrator Theodore W. Kheel, Esq., dated February 8, 1971, which enjoined defendant Commerce Tankers Corporation from transferring its vessel, the S/S "Barbara", to Vantage Steamship Corp., or any other purchaser, without complying with the provisions of Article I, Section 2 of the collective bargaining agreement between the National Maritime Union and Commerce Tankers Corporation, and for an injunction enforcing said award, and said motion having duly come on to be heard before this Court on February 23, 1971, at which time plaintiff appeared by Abraham E. Freedman, Esq., Charles Sovel of counsel, Commerce Tankers Corporation appeared by Messrs. Marshall, Bratter, Greene, Allison & Tucker, Charles H. Miller of counsel, and Vantage Steamship Corp. appeared by

Messrs. Hill, Betts & Nash and Messrs. Surrey Karasik, Greene & Seham, Martin C. Seham of counsel, and it having been stipulated by the parties that the Court might treat the motion as one for a preliminary injunction,

NOW, upon hearing the arguments of the parties, and upon reading the affidavit of D. David Cohen, sworn to on the 17th day of March, 1971, and upon the motion of Marshall, Bratter, Greene, Allison & Tucker, attorneys for Commerce Tankers Corporation, it is

ORDERED, that plaintiff's motion for a preliminary injunction is granted;

ORDERED, that pending the final decision in this case defendant, its officers, agents, attorneys and employees are enjoined and restrained from transferring its vessel, the S/S "Barbara", to Vantage Steamship Corp., or any other purchaser, without complying with Article I, Section 2 of the collective bargaining agreement between the National Maritime Union and Commerce Tankers Corporation and it is further

ORDERED, that Vantage Steamship Corp. may not purchase the vessel, S/S "Barbara" without complying with Article I, Section 2 of the collective bargaining agreement between the National Maritime Union and Commerce Tankers Corporation, and it is further

ORDERED, that Commerce Tankers Corporation is free to sell its vessel, the S/S "Barbara" to Vantage Steamship Corp. or to any purchaser who complies with Article I, Section 2 of the collective bargaining agreement between the National Maritime Union and Commerce Tankers Corporation, and it is further

ORDERED, that plaintiff shall post security in the amount of $10,000.

Dated: New York, New York
March , 1971

U. S. D. J.

HILL, BETTS & NASH
26 BROADWAY
NEW YORK, N. Y. 10004
TEL. (212) 269-2100

CHARLES B. HILL (1866-1959)
GEORGE W. BETTS, JR. (1871-1959)
J. NEWTON NASH (1899-1959)

WASHINGTON
1701 PENNSYLVANIA AVENUE
WASHINGTON, D. C. 20006
TEL. 202-298-7133
WILLIAM R. JOYCE, JR.
RESIDENT PARTNER

TOKYO
YAMAOKA, DE BECKER & YOSHIMOTO
NO 1-1, 2 CHOME
SHIMBASHI, MINATO KU
TOKYO, JAPAN

TELEX: NEW YORK 222144
WASHINGTON 244 73
TOKYO TR4525
ALL CABLES HILLBETTS

ORGE YAMAOKA
WIN LONGCOPE
I ELLIS
BERT P. BESHAR
NALD B. ALLEN
HN F. LANG
BERT S. BLANC, JR.
NJAMIN E. HALLER
VID C. WOOD
BERT H. PETERSON
VID I. GILCHRIST
BERT W. MULLEN

LAN J. BERDON
RLENE D. DANIELS
LLIAM H. LINDEMAN
ARA A. LAURO
WARD H. DUGGAN, JR.
AN I. HYMAN
BERT C. BUFF
KENT BISHOP
NNETH D. WASSERMAN
RK M. JAFFE
CHAEL B. JEFFERS
ANK H. LOOMIS
EPHEN F. DOWNS
BERT L. SMITH
HN F. X. McKIERNAN

March 13, 1971

The Honorable Saul Streit
Justice, Supreme Court of
the State of New York
County Courthouse
60 Centre Street
New York, New York

Re: Vantage Steamship Corp. v. Commerce Tankers Corporation, Petition and Cross-Petition, Cal. No. 117, March 10, 1971 (Index No. 03659/71)

Dear Justice Streit:

On the call of the calendar on March 10, 1971, the Petitioner, Vantage Steamship Corp., was granted leave to reply to the respondent's cross-motion until 4:00 P.M. Friday, March 12, 1971 because the respondent's cross-petition was served on the afternoon of March 8, 1971 and was made returnable on the morning of March 10, 1971 and therefore was not in compliance with the mandatory three day notice provision of CPLR 2215. Respondent was not granted leave to file additional papers.

Petitioner finally decided to rest on the papers filed on March 10, 1971. However, respondent, without the Court's permission, served and filed on the afternoon of March 12, 1971 a letter from its attorneys submitting further argument and making further unsubstantiated and inaccurate statements of fact.

In view of the respondent's unauthorized submission, Petitioner respectfully asks the Court to consider what is set forth herein before rendering its decision on the motion and cross-motion.

The respondent's attorneys have hit upon the crux of this matter when they stated:

> "How can it be said that there is no dispute between the parties (as Vantage does say, apparently with a straight face) when there is a contract of sale for a ship and one party [presumably they mean Commerce] is prepared to deliver the ship and the other party [presumably they mean Vantage] will not accept it?"

Let us put this misrepresentation by respondent to rest precisely and concisely. The Petitioner, Vantage Steamship Corp., categorically and unequivocally states that it is now and always has been and continues to be ready, willing and able to accept delivery of and pay for the vessel pursuant to the terms of the contract of sale between it as Buyer and Commerce as Seller, and that it will, even now, accept delivery of and pay for the vessel pursuant to the said contract of sale.

The trouble is that the respondent is now under an injunction pendente lite prohibiting it from selling the vessel. On March 2, 1971 Judge Marvin E. Frankel of the District Court for the Southern District of New York, on the application of the National Maritime Union ("NMU"), enjoined Commerce from selling the vessel to anyone who does not have a collective bargaining agreement with the NMU or who refuses to enter into a collective bargaining agreement with the NMU. This injunction pendente lite was granted in an action by the NMU against Commerce seeking a permanent injunction against Commerce permanently enjoining it from selling the vessel to anyone unless that person has or agrees to enter into a collective bargaining agreement with the NMU. Apparently, there is a clause in the Collective Bargaining Agreement between Commerce and the NMU which prohibits Commerce from selling the vessel to anyone unless that person has or agrees to enter into a collective bargaining agreement with the NMU.

The contract of sale of the vessel contains no such requirement. Vantage cannot contract with the NMU because it has a collective bargaining agreement with the Seafarers International Union.

The Petitioner has intervened in the District Court in the action by the NMU against Commerce and has joined with Commerce in contesting the validity of the said clause in the NMU Collective Bargaining Agreement and has filed unfair labor charges against NMU with the National Labor Relations Board alleging the illegality of the said clause. As the respondent has stated in the letter from its attorneys to your Honor dated March 12, 1971, this "issue is one of exclusive federal jurisdiction".

Thus, it is self-evident that there is no issue herein whether Petitioner has breached the contract of sale. Petitioner stands ready, willing and able to take the vessel and pay for it in accordance with the terms of the contract of sale. The issue on the legality or illegality of the restrictive clause in the NMU Collective Bargaining Agreement is not a matter for the arbitrator. That clause is not in the contract of sale; it is in an entirely different contract; and it is a matter of exclusive federal jurisdiction.

It is respectfully submitted that there is no issue for arbitration.

The respondent mis-leads the Court when it says that the vessel has been lying idle in Mobile, Alabama for several weeks. True, it has been in Mobile but it has been undergoing necessary repairs to make the vessel ready for delivery under the contract of sale. It may well be that the vessel is now ready for delivery and Petitioner repeats that it stands ready, willing and able to accept the vessel when and if Commerce tenders the vessel to it in accordance with the contract of sale.

Respectfully submitted,

HILL, BETTS & NASH

By _____
John F. Lang

JFL:mb

cc: Marshall, Bratter, Greene, Allison & Tucker, Esqs.

RECEIVED MAR 15 1971

EXHIBIT C - LETTER FROM VANTAGE TO DEFENDANT DATED MARCH 15, 1971

Vantage Steamship Corp.

CABLE ADDRESS: GINDISHIP
CABLE CODE: NEW BOE
PHONE: 425-7774
425-6161

11 BROADWAY, NEW YORK, N. Y. 10004

March 15, 1971

Commerce Tankers Corporation
Lake Success Park
Community Drive
Great Neck, New York 11021

Re: S.S. BARBARA

Dear Sirs:

It is a matter of extreme annoyance to have to reply to your poison pen letter of March 12, 1971.

You, who have failed to deliver the SS BARBARA to us pursuant to the contract of sale dated December 23, 1971, and who has tendered the vessel to our Charterer, Standard Oil Company of California ("SOCAL") on the same charter terms we had negotiated with Socal after we had signed our contract with you, accuse us of "tortious intervention".

Despite your shocking action, we, at your request, sent a telegram to Socal on March 11, 1971 informing them that we would not interfere with their use of the vessel under a charter from you. True, we did not yield on our position that we are entitled to damages from you now and fordelivery of the vessel to us when the restrictive clause in your Collective Bargaining Agreement with MMU is declared illegal or is terminated; but, then, you cannot say we are acting improperly if we assert our legal rights. We were willing to say that you could work the vessel without hindrance from us but we were not willing to say that we would waive all claims against you for damages for breach of contract.

Your mis-statement of what is plainly a matter of record is also a matter of great annoyance.

We are not under an injunction - you are. We have not stated that we cannot and would not comply with the terms of the preliminary injunction order of Judge Marvin E. Frankel. That injunction is directed against you - not against us. We are ready, willing and able to take delivery of the vessel.

We did not advise you on March 8, 1971 that we "were unwilling to commit to purchase the vessel "BARBARA" at such time as the MMU lawsuit would be resolved in a manner acceptable to you (us) or at the termination of the MMU Commerce Collective Bargaining Agreement". What we said was that your suggestion was an entirely new and different deal which was incapable of being assessed. We noted that you had not suggested how to resolve the question of adjusting the purchase price in view of a late delivery. What we were doing was inviting from you your suggestion as to how that could be resolved.

As a matter of fact, you and we reached an agreement in principal over the telephone on the evening of March 10, 1971 that you would delivery, and we would accept the vessel at the earlier of the time when the MMU clause should be declared illegal or the MMU Collective Bargaining Agreement would terminate and that the delivery would be pursuant to all of the terms and conditions of the contract of sale dated December 23, 1970 except that the purchase price would be reduced by an agreed dollar amount per day between March 20, 1971 and the time when the vessel would actually be delivered to us. You said that this was agreeable in principal and asked us to try to get Socal to hold open its consideration of the charter offer made by you to it until the morning of March 11, 1971. While you were on the hold button, we spoke to Socal and obtained their assurance they would wait until the morning of March 11 before reaching a final decision whether to charter the vessel from you, and further provided that we send them a telegram to arrive at their office during the morning of March 11 stating that we would not interfere with their use of the vessel under a charter from you. When we hung up with Socal and told you the successful result of our call, you then said that you would not do the deal without a further amendment which was completely unacceptable to us, namely, that, at the end of the term of your Collective Bargaining Agreement with MMU, if MMU should continue to insist that the vessel be soldonly to MMU operators, that we must agree to enter into a collective bargaining agreement with MMU. We became completely disgusted at this point. Nevertheless, we carried out our end of the bargain and did send a telegram to Socal on March 11, 1971 giving them the assurance that we would not interfere with their use of the vessel under a charter from you. That Socal finally decided not to accept the vessel from you under charter is not hard to understand.

We were not responsible for your failure in trying to pirate the Socal charter. You are responsible for causing us to lose our profitable charter with Socal and we shall look to you to recover our damages.

Very truly yours,

VANTAGE STEAMSHIP CORP.

By P. T. Corletta

P. T. CORLETTA,
President

PTC:cf

cc: Taylor, Forence & Simon, Esq.
60 E. 42 St., N.Y., N.Y.
Attn: Kenneth Simon, Esq.

John Lang, Esq.

EXHIBIT D - VANTAGE UNDERTAKING

(Omitted here but printed at p. 58a)

ENDORSED ORDER OF FRANKEL, U.S.D.J. ON MARCH 24, 1971
(71 CIV. 582) (Filed March 25, 1971)

National Maritime Union etc. v. Commerce Tankers Corp., 71 Civ. 582

Endorsement

The court's order of March 4, 1971, appears to dispose fully of the problems presented by the motion then decided. The warfare between Commerce and Vantage may well be affected by that order, bu this is not grounds for change. The quarrels between these two companies, now bared in a crossfire of conflicting charges and countercharges, are not suitable for resolution by the procedural device now tendered. It may be, as Commerce says, that its propos new order "only makes explicit the terms implicit" in the March 4 order. Assuming, without deciding, that this is so, the court does not deem this, in all the circumstances, a justification for substituting the new version. If any of the parties is responsibly thought to be evading, interfering with or flouting the court's or there are remedies for that.

The main thing the court proposes to avoid is any adjudicati of any kind upon the contractual disputes between Commerce and Vantage. Those have not been presented - perhaps they cannot be - as cross claims herein. They were not suggested as matters to be resolved, preliminarily or otherwise, on the motion for a temporary injunction. It is to be understood, therefore, that the are no implications in the present determination intended or fairl to be read as deciding, or even expressing views upon, the controve between Commerce and Vantage.

With the hope that this limitation will be understood, the court denies the motion for signing of the resettled order.

It is so ordered.

Dated: New York, New York
March 24, 1971

Marvin E. Frankel
U.S.D.J.

U.S. DISTRICT COURT S. D. OF N.Y. MAR 25 1971

Index No.

NOTICE OF ENTRY

Sir:

Please take notice that the within is a true copy of a

duly filed and entered in the office of the Clerk of this court.

Dated, N. Y.
Yours, etc.,

MARSHALL, BRATTER, GREENE, ALLISON & TUCKER

Attorneys for

430 Park Avenue
New York, N. Y. 10022

To

Esq.

Attorney(s) for

NOTICE OF SETTLEMENT

Sir:

Please take notice that an order of which the within is a true copy will be presented for settlement to the Honorable

one of the judges of the within named court on the day of at o'clock noon at

Dated, N. Y.
Yours, etc.,

MARSHALL, BRATTER, GREENE, ALLISON & TUCKER

430 Park Avenue
New York, N. Y. 10022

To

Esq.

Attorney(s) for

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF N.Y.

NATIONAL MARITIME UNION OF AMERICA, AFL-CIO,

Plaintiff,

- against -

COMMERCE TANKERS CORP.

Def

- and -

VANTAGE STEAMSHIP CO.

Original Intervening L

ORDER TO SHOW CAUSE AND AFFIDAV

MARSHALL, BRATTER, GREENE, ALLISON & TUCKER

Attorneys for Defendant

430 PARK AVENUE
BOROUGH OF MANHATTAN
New York, N. Y. 10022
Telephone No.: 212—4

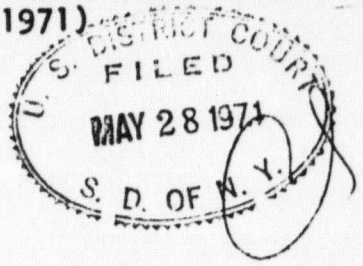
Service of a copy of the within

is hereby admitted

Dated:

Attorney(s) for

ORDER TO SHOW CAUSE BY DEFENDANT TO DISSOLVE PRELIMINARY INJUNCTION (71 CIV.582) (Filed May 28, 1971)



UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

NATIONAL MARITIME UNION OF AMERICA, AFL-CIO, Plaintiff, -against- COMMERCE TANKERS CORPORATION, Defendant, -and- VANTAGE STEAMSHIP CORP., Intervening Defendant.	Index No. 71 Civil 582 ORDER TO SHOW CAUSE UPON APPLICATION TO DISSOLVE A PRELIMINARY INJUNCTION

Upon the annexed affidavit of D. David Cohen, Esq., sworn to on the 27TH day of May, 1971, let the plaintiff and the intervening defendant show cause in Room 506 before a Judge of this Court on the 1ST day of JUNE, 1971 at 10:00 o'clock IN THE FORENOON at the United States District Court House, Foley Square, New York, New York, why the preliminary injunction obtained by plaintiff on March 4, 1971 should not be dissolved, and it is

ORDERED that service by ✓ o'clock on the 27 day of May, 1971 upon counsel for the plaintiff and intervening defendant be deemed good and sufficient service.

Dated: New York, New York
May 27TH, 1971

U.S.D.J.

AFFIDAVIT OF D. DAVID COHEN IN SUPPORT OF MOTION (71 CIV. 582)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

NATIONAL MARITIME UNION OF AMERICA, AFL-CIO, Plaintiff,	INDEX NO. 71 Civil 582
-against-	AFFIDAVIT
COMMERCE TANKERS CORPORATION, Defendant,	
-and-	
VANTAGE STEAMSHIP CORP., Intervening Defendant.	

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

D. DAVID COHEN, being duly sworn, deposes and says:

1. I am Assistant Secretary of defendant Commerce Tankers Corporation ("Commerce") and corporate counsel to Vernitron Corporation ("Vernitron"), the parent company of Commerce. The instant matter - which is a tri-partite dispute between the plaintiff National Maritime Union of America, AFL-CIO ("NMU"), defendant Commerce ("Commerce"), and intervening defendant Vantage Steamship Corp. ("Vantage") - has been before this Court previously on three separate occasions. At the present time the Vessel BARBARA, the last remaining

Vessel owned by Commerce, lies idle in the port of Mobile, Alabama. Any transfer or sale of the Vessel by Commerce is presently prohibited by a preliminary injunction issued by this Court unless the purchaser provides an undertaking to assume the NMU contract with respect to the Vessel. The order of preliminary injunction herein was issued by the Honorable Marvin E. Frankel of this Court on March 4, 1971 and a copy is annexed hereto as Exhibit "A". It is respectfully requested that the instant motion to dissolve the preliminary injunction, in support of which this affidavit is submitted, be referred to Judge Frankel.

2. The National Labor Relations Board ("NLRB"), which is charged with exclusive jurisdiction of matters arising under the National Labor Relations Act, has now determined that the provision contained in Article I, Section 2 of the NMU Collective Bargaining Agreement with Commerce (which is the basis for the injunction sought to be dissolved), is violative of Section 8(e) of the National Labor Relations Act and has instituted a complaint against NMU asking inter alia that the NMU cease and desist from insisting upon compliance with Article I, Section 2 of the Agreement. A copy of the order to show cause bringing on the NLRB's motion for a preliminary injunction against the NMU restraining it, inter alia, from giving effect to or enforcing Article I, Section 2 of the NMU Collective Bargaining Agreement is annexed hereto as Exhibit "B". The determination by the NLRB and the initiation of the complaint is such a material change of circumstance that Commerce respectfully requests that this Court reconsider its decision of March 2, 1971 and the provisions of its order of March 4, 1971.

3. Providing Commerce with relief from the injunction remains crucial for the economic success--perhaps even the economic salvation--of Commerce and its parent company. From the date of the injunction until very recently, Vantage had asserted a right to purchase the Vessel pursuant to the terms of the Contract of Sale, dated December 23, 1970 which Contract does not by its literal terms require Vantage to provide an undertaking of the NMU. Vantage stated that its literal reading of the Contract of Sale is proper and that Commerce had a duty to deliver the Vessel to it without requiring Vantage to supply the NMU undertaking.* Thus, the Vessel had been immobilized and rendered useless to Commerce for a significant period of time.

4. At the present time an arbitration demanded by Commerce by notice dated February 10, 1971, and diligently sought by Commerce since that date, has commenced. In the arbitration, Vantage's counsel has admitted for the record that Vantage does not want the Vessel and has not really wanted it at the contract price since mid-March. On Wednesday, May 26, 1971, Vantage and Commerce entered into a

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* The Contract provides in pertinent part that

> "In the event transfer of title to said Vessel is delayed, for reasons beyond the control of the Seller, or if repairs are made to the Vessel at the place of drydock for Seller's account, so that she is not ready for transfer to the Buyer on or before March 31, 1971, the Buyer shall have the right to cancel this contract, provided written or telegraphic notice of such cancellation is given to the Seller on or before 5:00 p.m. New York time, April 4, 1971." [Emphasis supplied]

Vantage did not cancel prior to April 4th and in fact stated on March 31st that specific performance of the Contract was the relief it was seeking in the arbitration.

stipulation on the record which provides in part that without prejudice to the claims and counterclaims of either party, "Commerce shall be and hereby is, free to sell, transfer, charter or otherwise dispose of the vessel BARBARA without any such sale, transfer, charter or other disposition being deemed to be a breach of the contract by either party." This agreement had been sought by Commerce, and refused by Vantage, since the inception of the NMU problem in this matter.

5. It is not the intention of Commerce to set out again the facts of this tri-partite dispute which have been presented to this Court in detail on the prior motions, particularly in connection with Commerce's motion to resettle. However, at no time and in no way did the officers of Commerce or its parent company in any way attempt to participate in a conspiracy to evade or even to test the validity of the NMU provisions. Commerce expressly advised Vantage that the unions on the Vessel would have to be retained. Commerce has been dragged into this struggle for union power by the wholly unreasonable and possibly fraudulent conduct of Vantage. Once in the fight, Commerce joined in the argument adhered to at all times that the NMU undertaking requirement was--in view of the fleet-wide principle--an unfair and illegal requirement both under the provisions of the National Labor Relations Act and the antitrust laws. This argument has now been supported by the NLRB determination.

6. In the pre-trial deposition of Mr. Eugene Spector of the NMU, and in the preparation for the arbitration, a clearer understanding of the genesis of this tragic

and chaotic situation has been developed. A recitation of the facts is necessary to spell out for the Court the basis for Commerce's position that Commerce is clearly entitled to the equitable relief it seeks here. In October, 1970 certain business problems required Vernitron to make immediate plans for the sale of the vessels. In discussing the matter with Mr. Milton Pilalas ("Pilalas"), then the principal officer of Commerce, Vernitron was advised that Pilalas sought to acquire the vessels either in exchange for the stock he had originally received or on some other negotiated basis. Because the arrangements Pilalas proposed were not commercially acceptable, the task thereafter of handling the negotiations for the sale of the vessels was undertaken by officers of Vernitron.

7. From October, 1970 forward the principal officers of Commerce and Vernitron had in fact virtually effected a "commercial divorce". Although Commerce nominally remained one legal entity clearly after this date there were two teams of Commerce people: (i) Pilalas-Commerce and (ii) Vernitron-Commerce. Pilalas-Commerce ran the Company. Vernitron-Commerce pursued the sale of the vessels. Because Pilalas was one of the offerors for the vessels he was not a member of the Vernitron-Commerce team engaged in the sale of the vessels.

8. In late December representatives of Vernitron were reintroduced to Vantage as a proposed buyer for the Vessel BARBARA. Vernitron was aware that Pilalas-Commerce had previously discussed the possible sale with Vantage, and knew of no reason why Vantage might be "ineligible" to

purchase Commerce's vessels. In fact, the prior negotiations had been commenced by Pilalas with Vantage on the express written condition that the unions on the ship would be retained by the buyer. Negotiations were had in which Vernitron-Commerce advised Vantage that so far as it understood, the unions, including the NMU, would insist upon being retained on the Vessel. This was the extent of the knowledge and understanding of the principal officers of Vernitron who had no prior experience in the shipping industry and no knowledge of the bitter rivalry between the competing maritime unions or of the unusual NLRB rule referred to as the "fleet-wide" principle. Although the contract of sale does not include a literal assumption of the unions, Vernitron-Commerce believed, based upon the successorship principle, John Wiley & Sons v. Livingston, 376 U.S. 543 (1964), that such an omission did not in any way divest the NMU of its right, if legal, to enforce any of the provisions of the agreement.

9. Based upon the representations made by Vantage at the final session of the negotiations, Vernitron was persuaded that the written undertaking of the union could be omitted because Vantage was prepared to meet the entire burden of any labor problem which might arise and that Vantage was willing to and capable of handling any labor problem. On December 23, 1970, the Contract of Sale was executed without further discussion of the union issue.

10. Neither Commerce nor Vernitron made a "secret" of the sale of the Vessel BARBARA. The transaction was reported in the public press and an extensive story on the matter appeared in the WALL STREET JOURNAL. It was also

widely reported in the maritime industry trade media including the JOURNAL OF COMMERCE that the buyer was identified as Vantage. As a result of the publicity given the transfer, the NMU learned not later than January 5, 1971 that Vernitron had acted to sell the Vessels BARBARA and THALIA. In fact, the NMU had arranged for the transfer of the crew of the THALIA in December, 1970. After learning of the transaction, the NMU contacted Mr. Pilalas of Commerce. They were immediately advised by him that the transactions had been arranged by Vernitron and that in fact he had little knowledge of it. The NMU was orally advised by representatives of Commerce of the "commercial divorce" which had been effected between Vernitron-Commerce and Pilalas-Commerce. Without checking with Vernitron, Pilalas promptly and truthfully, as to his knowledge, answered the NMU written request for information.

11. From January 5 to January 25 the NMU made no attempt to contact the officers of Vernitron known to them to have been responsible for the transaction in question. During those 20 days, significant developments with respect to both defendant and intervenor defendant transpired. Vernitron negotiated a complete refinancing of its $15,000,000.00 indebtedness to Hambros Bank Limited of London, England which was accomplished as of January 15, 1971. Vantage obtained a charter for the Vessel BARBARA with Standard Oil of California on January 25th.

12. Finally, on January 25, 1971, the NMU telephoned Vernitron and demanded an immediate arbitration. By immediate they clearly meant immediate since the arbitrator selected in

the Collective Bargaining Agreement was about to leave for a trip abroad from which he would not return until February 8, 1971. Vernitron readily agreed to the earliest possible date for arbitration--February 8, 1971. In this telephone call and in later telegrams the NMU did not in any way indicate that the relief it would seek was an injunction against the transaction. If the NMU only wanted the buyer to provide the undertaking, Commerce couldn't care less, and in fact had warned Vantage that that would be the case.

13. Vantage never stated that it would not or could not under any circumstances employ the NMU crew until February 4th, four days prior to the adjourned date for the arbitration. Only then did the crisis begin (insofar as Vernitron-Commerce knew) and that is why when on Friday, February 5th, the NMU demanded for the first time injunctive relief, Commerce sought a 72 hour delay to prepare.

14. As soon as Commerce was aware that Vantage was unwilling or unable to take on the NMU crew and contract, Commerce immediately sought to either cancel the Contract of Sale or obtain special dispensation from the NMU allowing Vantage to accept the Vessel and change the collective bargaining representative. Only because neither the NMU nor Vantage (undoubtedly spurred by the SIU) will let go, does the present predicament continue. Under these circumstances, clearly it is equitable to relieve Commerce from the weight of the injunction while the NMU contests the NLRB determination as to the illegality of the provisions of Article I, Section 2 of the Collective Bargaining Agreement.

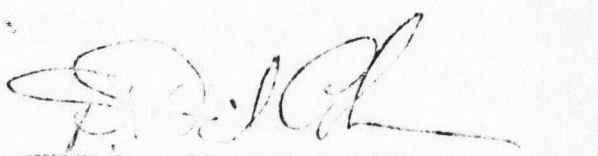
15. Finally, it must be noted that if the NMU provisions withstand eventual judicial examination of the NLRB determination, Vantage has already filed with this Court a written undertaking which provides:

> "...[I]f NMU succeeds in this action in obtaining a final confirmation of the award of the arbitrator permanently restraining and enjoining Commerce from selling the SS BARBARA to any purchaser who does not comply with Article I, Section 2, of the current Collective Bargaining Agreement between Commerce and NMU, Vantage will put NMU in the same position for the remaining period of the said Collective Bargaining Agreement applicable to the SS BARBARA, that it would have been had the restraining order been continued, which undertaking includes representations by Vantage to the NLRB that it will not withdraw its charge alleging unfair labor practice under Section 8(e) of the National Labor Relations Act and that it will abide by any final determination of the National Labor Relations Board relating to this matter."

16. This motion is brought on by order to show cause rather than ordinary notice of motion because of the economic necessities of Commerce's parent corporation to be free of the injunction.

17. No previous application for the relief sought herein has been made.

WHEREFORE, your deponent respectfully requests that the within order to show cause be signed and Commerce's motion to dissolve the preliminary injunction be granted.



D. David Cohen

Sworn to before me this
day of May,

EXHIBITS ANNEXED TO FOREGOING AFFIDAVIT

EXHIBIT A - PROPOSED ORDER

(Omitted here but printed at p. 124a)

EXHIBIT B - ORDER TO SHOW CAUSE (71 CIV. 2300)

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

SIDNEY DANIELSON, Acting Regional Director of the Second Region of the National Labor Relations Board, for and on behalf of the NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

NATIONAL MARITIME UNION OF AMERICA, AFL-CIO

Respondent.

71 Civil 2300

ORDER TO SHOW CAUSE

The petition of Sidney Danielson, Acting Regional Director of the Second Region of the National Labor Relations Board, having been filed pursuant to Section 10(1) of the National Labor Relations Act, as amended (61 Stat. 149; 73 Stat. 544; 29 U.S.C. Sec. 160(1), herein called the Act, praying for issuance of an order directing respondent above named to show cause why an injunction should not issue enjoining and restraining said respondent from engaging in certain acts and conduct in violation of said Act, pending the final disposition of the matters involved pending before said Board, and good cause appearing therefor.

IT IS ORDERED that respondent appear before this Court, at the United States Courthouse, Room 506, Foley Square, New York, New York on the 14th day of May, 1971 at 10:00 a.m., or as soon thereafter as counsel can be heard, and then and there show cause, if any there be, why, pending the final disposition of the matters involved pending before the National Labor Relations Board, respondent, its officers, representatives, agents, servants, employees, attorneys and all members and persons acting in concert or participation with it or them, should not be enjoined and restrained as prayed in said petition; and

IT IS FURTHER ORDERED that if respondent files an answer to the allegations of said petition, it shall file such answer with the Clerk of this Court, after service of a copy thereof upon petitioner at his office located at Federal Building, Room 3614, 26 Federal Plaza, New York, New York 10007, on or before 1 P .m. on the 28th day of May, 1971; and

IT IS FURTHER ORDERED that service of a copy of this order, together with a copy of the petition, affidavit and exhibits upon which it is issued, shall be served by Registered Mail on respondent and upon Vantage Steamship Corporation, the charging party before said Board, on or before the 28th day of May, 1971 at 1 P .m. and service may be made by a United States Marshal or by Petitioner's representative, in any manner provided in the Rules of Civil Procedure for the United States District Courts, and that proof of such service be filed herein; and

IT IS FURTHER ORDERED, good cause having been shown therefore, that memoranda in support of, and in opposition to, the within application may be served and filed by the parties by 12 o'clock noon on the day before the time fixed upon the return of this application for the hearing thereon.

Done at New York, New York, this 28th day of May, 1971.

/s/ Sidney Sugarman

U.S.D.J. United States District Judge

FOR THE SOUTHERN DISTRICT OF NEW YORK

SIDNEY DANIELSON, Acting Regional Director of the Second Region of the National Labor Relations Board, for and on behalf of the NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

NATIONAL MARITIME UNION OF AMERICA, AFL-CIO

Respondent.

U.S. District Court
Filed
May 24 1971
S.D. of N.Y.

71 Civil 2300

PETITION FOR INJUNCTION UNDER SECTION 10(1) OF THE NATIONAL LABOR RELATIONS ACT, AS AMENDED

To the Honorable, the Judges of the United States District Court for the Southern District of New York:

Comes now Sidney Danielson, Acting Regional Director of the Second Region of the National Labor Relations Board (herein called the Board), and petitions this Court for and on behalf of the Board, pursuant to Section 10(1) of the National Labor Relations Act, as amended, (61 Stat. 149; 73 Stat. 544; 29 U.S.C., Sec. 160(1); herein called the Act, for appropriate injunctive relief pending the final disposition of the matters involved herein pending before the Board on a charge alleging that respondent has engaged in, and is engaging in a violation of Section 8(e) of the Act. In support thereof, petitioner respectfully shows as follows:

1. Petitioner is Acting Regional Director of the Second Region of the Board, an agency of the United States, and files this petition for and on behalf of the Board.

2. Jurisdiction of this Court is invoked pursuant to Section 10(1) of the Act.

3. On February 16, 1971, Vantage Steamship Corporation (herein called Vantage), pursuant to provisions of the Act, filed a charge alleging, inter alia, that respondent, a labor organization, has engaged in, and is engaging in, an unfair labor practice within the meaning of Section 8(e) of the Act. A copy of said charge is attached hereto as Exhibit 1 and made a part hereof.

4. The aforesaid charge was referred to the Regional Director of t Second Region of the Board.

5. Upon the basis of the following, petitioner has reasonable caus to believe that said charge is true and that a complaint of the Board based thereon should issue against respondent pursuant to Section 10(b) of the Act. More particularly, petitioner has reasonable cause to believe, and believes that respondent is a labor organization within the meaning of Sections 2(5), 8(e) and 10(l) of the Act, and that said respondent has engaged in, and is engaging in, a violation of Section 8(e) of the Act, affecting commerce with the meaning of Sections 2(6) and (7) of the Act, as follows:

(a) Respondent, an unincorporated association, is an organizatio in which employees participate and which exists for the purpose, in whole or part of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

(b) Respondent maintains its principal office in New York City, and at all times material herein has been engaged within this judicial distri in transacting business and in promoting and protecting the interests of its employee members.

(c) Vantage, a New York corporation with an office at 11 Broadway New York, New York, owns and operates American-flag freight ships engaged in the transportation of various goods and commodities in interstate and foreign commerce and derives an annual gross revenue from said operations in excess of one million dollars annually.

(d) At all times material herein, Vantage owned or operated four vessels as aforesaid and has recognized the Seafarers International Union of North America - Atlantic, Gulf Lakes and Inland Water District, AFL-CIO (herei called SIU) as the collective bargaining representative for the unlicensed cre employed aboard said vessels.

(e) At all times material herein, Commerce Tankers Corporation (herein called Commerce), a wholly owned subsidiary of Veraitron Corporation (he ein called Veraitron), a Delaware corporation with an office at Great Neck New York, has owned and operated American-flag freight ships engaged in the t nsportation of various goods and commodities in interstate and foreign ..erce. Commerce's gross annual revenue from said operations exceeds ,000,000.

BEST COPY AVAILABLE

(f) During the past year Commerce owned or operated two vessles aforesaid, the S.S. Barbara and the S.S. Thalia (herein respectively called t Barbara and Thalia). At all times material herein, Commerce has recognized t National Maritime Union of America, AFL-CIO (herein called NMU) as the collec ive bargaining representative of the unlicensed crew employed aboard said vessels.

(g) In about June 1969 NMU and Commerce entered into a collectiv bargaining agreement effective for the period June 16, 1969 to June 15, 1972, which contains in Article 1 thereof, inter alia, the following clauses.

> Section 2. Sale and Transfer of Vessels. (a) The Company agrees with respect to any vessel which is presently under or may hereafter come under this Agreement, that if during the term of this Agreement said vessel is sold or transferred in any manner to any other business entity not covered by this Agreement for operation under United States flag (but not including a vessel which the Company bareboat charters and the charter is terminated), said vessel shall be sold or transferred with the complement of employees who either are or shall be provided by the Union in accordance with the terms of this Agreement, or such number as may be agreed upon between the Union and the transferee. The term "transfer" shall be construed to include any chartering of a vessel by the Company.
>
> (b) The Company obligates itself to obtain for the benefit of the Union a written undertaking with the Union to be executed by the business entity to which the vessel has been sold or transferred that for the full term of the Agreement all of its terms and provisions shall apply to said vessel except as hereinabove provided and that said business entity will fully comply with all of the terms and provisions of this Agreement and any amendments thereto to preserve the jobs and job rights of the Unlicensed Personnel covered by this Agreement and to protect and maintain the wages, pension rights and other economic benefits and working conditions provided such personnel under this Agreement.
>
> (c) The Company agrees that if it desires to sell, bareboat charter or in any manner whatsoever transfer a vessel to another business entity, whether for United States flag or Foreign-flag registry, timely written notice to the Union must first be given prior to any such sale or transfer.
>
> (d) This Section shall be deemed of the essence of the Collective Bargaining Agreement and in the event of any violation, the no-strike provision of this Agreement shall not be applicable.

(h) In about December 1970, Commerce contracted to sell the Barbara to Vantage without obtaining from Vantage an undertaking that Vantage honor and abide by the NMU-Commerce collective bargaining agreement.

(i) On January 11, 1971, NMU, by its Vice-President, Mel Barisic, wrote the following letter to Commerce:

> It has come to our attention that you are contemplating the sale of the S/S BARBARA to another American-flag Steamship Company.
>
> Your attention is directed to Article I, Section 2 of the Collective Bargaining Agreement which requires that you obtain from the purchasing company, as a condition of any such sale, an agreement that the Collective Bargaining Agreement shall continue to apply to the vessel.
>
> Please advise at once by return mail whether you are in fact contemplating the sale of the vessel, if so to whom and what steps you are taking in compliance with the Collective Bargaining Agreement.

(j) On January 13, 1971, Commerce, by its President, Milton Palelas, replied to NMU as follows:

> In reply to your letter of January 11, 1971 addressed to me as President of Commerce Tankers Corporation, I wish to advise that our tanker "THALIA" was sold and delivered to Texas City Refining, Inc. on December 23, 1970, and further, that a Contract of Sale has been entered into for the "BARBARA" to the Vantage SS Corporation for delivery scheduled sometime in February.
>
> Commerce Tankers Corporation is a wholly-owned subsidiary of Vernitron Corporation, and the final negotiations for the sale of these vessels were made directly between Vernitron Corporation and the buyers through the brokerage firm of Blix-Mallory & Company. For your guidance, at the start of negotiations for the sale of these vessels I advised Mr. Blix of Blix-Mallory & Company that the same unions, including NMU, with which Commerce Tankers Corporation had collective bargaining agreements must continue to man the vessels after their sale, and that this was to be made a condition of the sale; and he assured me that this was fully understood and would be impressed on prospective buyers. I know that the same unions are continuing on the THALIA and have no reason to believe that it will be otherwise with the BARBARA.

(k) At all times since about January 11, 1971, NMU has insisted that Commerce refrain from a sale or transfer of the Barbara to Vantage or any other person unless Commerce fully complies with the clauses of its collective bargaining agreement with NMU as set forth above in subparagraph (g).

(l) When Commerce failed to comply with the terms of the aforesaid collective bargaining agreement with respect to the sale of the Barbara to Vantage, NMU sought and obtained an arbitration award on February 8, 1971, enjoining and restraining Commerce from delivering the Barbara to Vantage or any other purchaser without complying with the provisions of the collective bargaining agreement recited in subparagraph (g) above.

(m) Commerce is not a member of any association of employers for purposes of collective bargaining with NMU, and in entering into the agreement described in subparagraph (g), above, independently adopted the terms of the agreement entered into by and between the NMU and the Tankers Service Committ

6. It may fairly be anticipated that, unless enjoined, respondent will continue to give effect to the contract clauses referred to in paragraph 5, subparagraph (g) above, or enter into a similar or like contract clause or agreement in violation of Section 8(e) of the Act. It is therefore essential, appropriate, just and proper, for the purpose of effectuating the policies of the Act, and in accordance with the provisions of Section 10(1) thereof, that, pending final disposition of the matters involved herein pending before the Board, respondent be enjoined and restrained from maintaining, enforcing, giving effect to or otherwise entering into the contract clause referred to in paragraph 5, subparagraph (g) above, and from entering into any other similar contract clause or agreement.

7. No previous application has been made for the relief sought herein. However, on March 2, 1971, the Hon. Marvin E. Frankel, entered an Opinion which inter alia, confirmed the arbitration award referred to in paragraph 5, subparagraph (1) above, in an action brought by NMU against Commerce, 71 Civ. 582. In view of the foregoing, and to avoid any possibility of an order issuing in this case which, if this petition be granted, would conflict with the order contained in the aforesaid Opinion, petitioner respectfully requests that the Order to Show Cause and Petition herein be referred to Judge Frankel.

WHEREFORE, Petitioner prays:

1. That the Court issue an order directing respondent to appear before this Court, at a time and place fixed by the Court, and show cause, if any there be, why an injunction should not issue enjoining and restraining respondent, its officers, representatives, agents, servants, employees, attorneys, and all members and persons acting in concert or participation with it, pending the final disposition of the matters involved herein pending before the Board, from:

(a) Maintaining, giving effect to, enforcing or otherwise enteri into the collective bargaining between NMU and Commerce effective for the ter June 16, 1969 to June 15, 1972, as reaffirmed by NMU and Commerce in January and February 1971, insofar as said contract provides that:

> (a) The Company agrees with respect to any vessel which is presently under or may hereafter come under this Agreement, that if during the term of this Agreement said vessel is sold or transferred in any manner to any other business entity not covered by this Agreement for operation under United States flag (but not including a vessel which the Company bareboat charters and the charter is terminated), said vessel shall be sold or transferred with the complement of employees who either are or shall be provided by the Union in accordance with the terms of this Agreement, or such number as may be agreed upon between the Union and the transferee. The term "transfer" shall be construed to include any chartering of a vessel by the Company.
>
> (b) The Company obligates itself to obtain for the benefit of the Union a written undertaking with the Union to be executed by the business entity to which the vessel has been sold or transferred that for the full term of the Agreement all of its terms and provisions shall apply to said vessel except as hereinabove provided and that said business entity will fully comply with all of the terms and provisions of this Agreement and any amendments thereto to preserve the jobs and job rights of the Unlicensed Personnel covered by this Agreement and to protect and maintain the wages, pension rights and other economic benefits and working conditions provided such personnel under this Agreement.

(b) Entering into, maintaining, giving effect to, or enforcing any other contract or agreement, express or implied, whereby respondent requires Commerce, to cease or refrain or agree to cease or refrain from handling, using selling, transporting, or otherwise dealing in the products of any other employer, or from doing business with any other person.

2. That upon return of said order to show cause, the Court issue an order enjoining and restraining respondent in the manner set forth above.

3. That the Court Grant such further and other relief as may be just and proper.

Dated at New York, New York, this 24th day of May, 1971.

/s/ Sidney Danielson

Sidney Danielson, Acting Regional Direct
Second Region
National Labor Relations Board

ARNOLD ORDMAN,
General Counsel,

DOMINICK L. MANOLI,
Associate General Counsel,

JULIUS G. SEROT,
Assistant General Counsel,

WINIFRED D. MORIO,
Acting Regional Attorney,

EDWIN H. BENNETT,
Attorney, Region 2

EXHIBIT C1 - ALLEGATIONS OF UNFAIR LABOR PRACTICE UNDER SECTION 8(a) NATIONAL LABOR RELATIONS ACT

2nd REGION ... NATIONAL LABOR RELATIONS BOARD

CHARGE ALLEGING UNFAIR LABOR PRACTICE UNDER SECTION 8(a) OF THE ACT.

INSTRUCTIONS: File an original and [illegible] of this charge, and an additional copy for each organization, each local and each individual named in item 1 with the NLRB regional director for the region in which the alleged unfair labor practice occurred or is occurring.

CASE NO. 2 -CE- 44

DATE FILED 2/16/71

1. CHARGE FILED AGAINST: EMPLOYER(S) AND LABOR ORGANIZATION(S) ☒ EMPLOYER ☐ LABOR ORGANIZATION ☐

NAME OF LABOR ORGANIZATION (Give full name, including local name and number)
National Maritime Union

ADDRESS (Street and number, city, zone, and State)
36 Seventh Avenue, New York, N.Y.

NAME OF EMPLOYER Commerce Tankers Corporation

LOCATION OF PLANT INVOLVED (Street, City, and State) c/o Vernitron Corporation
175 Community Drive
Lake Success Park, Great Neck, N.Y. 11021

TYPE OF ESTABLISHMENT (Factory, mine, wholesaler, etc.)	IDENTITY OF PRINCIPAL PRODUCT OR SERVICE	NO. OF WORKERS EMPLOYED
Maritime	Shipping	Unknown

THE ABOVE-NAMED LABOR ORGANIZATION(S) OR ITS AGENTS, AND/OR EMPLOYER(S) HAS (HAVE) ENGAGED IN AND IS (ARE) ENGAGING IN UNFAIR LABOR PRACTICES WITHIN THE MEANING OF SECTION 8(a) OF THE NATIONAL LABOR RELATIONS ACT, AND THESE UNFAIR LABOR PRACTICES ARE UNFAIR PRACTICES AFFECTING COMMERCE WITHIN THE MEANING OF THE ACT.

2. BASIS OF THE CHARGE (Be specific as to facts, names, places involved, dates, places, etc.)

Since in or about June 1969 and thereafter, the abovenamed labor organization and the abovenamed employer, engaged in an industry affecting commerce, entered into a contract or agreement in writing whereby such employer agreed to cease or refrain from doing business with any other person, to wit, selling or transferring a vessel unless the purchaser or transferee thereof (a) agreed to furnish a written undertaking with the above-named labor organization that for the full term of the collective bargaining agreement all of its terms and provisions shall apply to the vessel being sold or transferred and (b) agreed to comply with all of the terms and provisions of the said collective bargaining agreement including, but not limited to, employing only members of the above-named labor organization. In the alternative, the agreement provides that the sale or transfer of any vessel covered thereby may also be made to those purchasers or transferees who have contracts with the above-named labor organization.

On or about December 23, 1970, the abovenamed employer executed a contract agreeing to the sale of the SS BARBARA (SEE RIDER ATTACHED)

3. FULL NAME OF PARTY FILING CHARGE (If labor organization, give full name, including local name and number)
Vantage Steamship Corporation

4. ADDRESS (Street and number, city, zone, and State) 11 Broadway, New York, N.Y. TELEPHONE NO. 425-6161

5. FULL NAME OF NATIONAL OR INTERNATIONAL LABOR ORGANIZATION OF WHICH IT IS AN AFFILIATE OR CONSTITUENT UNIT (To be filled in when charge is filed by a labor organization)

6. ADDRESS OF NATIONAL OR INTERNATIONAL, IF ANY (Street and number, city, zone, and State) TELEPHONE NO.

7. DECLARATION

I DECLARE THAT I HAVE READ THE ABOVE CHARGE AND THAT THE STATEMENTS THEREIN ARE TRUE TO THE BEST OF MY KNOWLEDGE AND BELIEF.

HILL, BETTS & NASH

BY John F. Lang
(Signature of representative or person filing charge)

February 12 1971 (Tel. No. 21[illegible]) Attorney Member of the firm
(Date) (Title, if any)

WILLFULLY FALSE STATEMENTS ON THIS CHARGE CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION [illegible])

[illegible]

to the charging party, which is the owner and/or operator of four (4) vessels whose employees are covered under a collective bargaining agreement with a labor organization different from the abovenamed labor organization.

On or about February 8, 1971 the abovenamed labor organization sought to give effect to, maintain and enforce the illegal provisions of its collective bargaining agreement, as aforesaid, by instituting or proceeding with an arbitration to declare the contract of sale dated December 23, 1970 invalid and void and seeking to enjoin the abovenamed employer from selling the SS BARBARA to the charging party. Upon information and belief, an award was rendered on or about February 8, 1971 granting the relief requested by the abovenamed labor organization; and a motion has been brought returnable on February 16, 1971 in the United States District Court, Southe District of New York, to enforce the arbitration award and enforce the illegal clause of the collective bargaining agreement.

By these and other acts, the abovenamed labor organization and the abovenam employer have violated Section 8(e) of the Act by entering into a contract agreement whereby the abovenamed employer agreed to cease doing business wi any other person and specifically selling or transferring its vessels only certain persons, as aforesaid, and by enforcing the illegal agreement in arbitration and judicial proceedings.

Rider to Form NLRB-509 - National Maritime Union

STATE OF NEW YORK)
)SS:
COUNTY OF NEW YORK)

I, Sidney Danielson, being first duly sworn, depose and say that I am the Acting Regional Director of the Second Region of the National Labor Relations Board; that I have read the foregoing petition and know the conten thereof; that the statements therein made as upon personal knowledge are tru and those made as upon information and belief I believe to be true.

/s/ Sidney Danielson

Sidney Danielson

Subscribed and sworn to before me
this 17 day of May 1971.

/s/ Arthur A. Herman

Arthur A. Herman
Notary Public State of New York
Qualified in Nassau County
No. 30-1760250
Term Expires March 30, 1973

STATE OF NEW YORK)
)SS:
COUNTY OF NEW YORK)

I, Sidney Danielson, being first duly sworn, depose and say that I am Acting Regional Director of the Second Region of the National Labor Relatic Board; that Section 10(1) of the National Labor Relations Act provides that "petitions filed under this Act shall be heard expeditiously, and if possible within ten days after they have been docketed." In order to meet the requirements of said subsection, petitioner, rather than moving by notice of motion, requests the issuance of the order to show cause herein returnable at the earliest date possible. Further, inasmuch as a hearing will be required on the petition, and because of the nature of these proceedings, issue has not yet been joined, and petitioner also requests that any memoranda furnished by the parties shall be filed after the joinder of issue by service of an answer, or by twelve o'clock noon on the day before the time to be fixed for a hearing on the petition upon the return of the order to show cause herein.

/s/ Sidney Danielson
Sidney Danielson

Subscribed and sworn to before
me this 24 day of May 1971.

/s/ Arthur A. Herman
Arthur A. Herman
Notary Public State of New York
Qualified in Nassau County
No. 30-1769250
Term Expires March 30, 1973

DECISION OF CROAKE, U.S.D.J. ON JUNE 22, 1971
(71 CIV. 2300 & 71 CIV. 582) (Filed June 22, 1971)

Comm 41
MARKED FOR ID.
B. BOOS 4/8 11:24

FILED
U.S. DISTRICT COURT
JUN 22 4 09 PM '71
S.D. OF N.Y.

Copy # 37775

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

EVAN C. McLEOD, Regional Director of the Second Region of the National Labor Relations Board,

Petitioner,

- v -

NATIONAL MARITIME UNION OF AMERICA, AFL-CIO, and COMMERCE TANKERS CORPORATION,

Respondents.

71-Civ.2300

NATIONAL MARITIME UNION OF AMERICA, AFL-CIO,

Plaintiff,

- v -

COMMERCE TANKERS CORPORATION,

Defendant,

- v -

VANTAGE STEAMSHIP CORP.,

Intervening Defendant.

71-Civ.582

FILE
C- 88

APPEARANCES:

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- and -
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By: John Lang, Esq.
Of Counsel

CROAKE, D. J.

[redacted]

Because of the procedural situation, to be described, this one opinion shall apply as indicated to the two separate but related actions captioned above. A motion is pending in each matter; in the first, the National Labor Relations Board ("NLRB") seeks a preliminary injunction against alleged violations by respondents of 29 U.S.C. 158(e), pending final determination of the issue by the NLRB itself. In the second action, the court is requested to vacate a preliminary injunction previously entered against defendants.

I

Both actions grew out of the same factual content. Commerce Tankers Corporation ("Commerce"), a subsidiary of Vermitron Corporation, holds title to the tanker "Barbara," and previously owned a second ship, now sold. Commerce is party to an agreement with National Maritime Union of America, AFL-CIO ("NMU"), under which NMU is recognized as the sole collective bargaining agent for the unlicensed seamen aboard the "Barbara." This agreement contains a provision

that if the "Barbara" is sold for operation under the United States flag, Commerce will obtain from the purchaser a written undertaking, for the benefit of IBU, that the agreement between IBU and Commerce will continue to apply to the operation of the Barbara and that the purchaser will comply with the said agreement - in other words, that IBU will continue to be the collective bargaining agent for the crew. The agreement provides for arbitration.[1]

---

[1] The relevant clauses provide as follows:

"(a) The Company agrees with respect to any vessel which is presently under or may hereafter come under this Agreement, that if during the term of this Agreement said vessel is sold or transferred in any manner to any other business entity not covered by this Agreement for operation under United States flag (but not including a vessel which the Company bareboat charters and the charter is terminated), said vessel shall be sold or transferred with the complement of employees who either are or shall be provided by the Union in accordance with the terms of this Agreement, or such number as may be agreed upon between the Union and the transferee. The term 'transfer' shall be construed to include any chartering of a vessel by the Company.

"(b) The Company obligates itself to obtain for the benefit of the Union a written undertaking with the Union to be executed by the business entity to which the vessel has been sold or transferred that for the full term of the Agreement all of its terms and provisions shall apply to said vessel except as hereinabove provided and that said business entity will fully comply with all of the terms and provisions of this Agreement and any amendments thereto to preserve the jobs and job rights of the Unlicensed Personnel covered by

There are two major unions representing unlicensed seamen on American flag vessels: MMP and the Seafarers' International Union ("SIU") which are intense rivals. To preserve some labor-management stability in the maritime industry, the practice has evolved and has been sanctioned that collective bargaining agreements should usually cover the crew members of all vessels in a fleet owned by a single employer and its related companies. Moore-McCormack Lines, Inc., 139 NLRB 769 (No. 70), 51 LRRM 1361 (1962).[2] A corollary of this principle is that

"this Agreement and to protect and maintain the wages, pension rights and other economic benefits and working conditions provided such personnel under this Agreement.
"(c) The Company agrees that if it desires to sell, bareboat charter or in any manner whatsoever transfer a vessel to another business entity, whether for United States flag or Foreign-flag registry, timely written notice to the Union must first be given prior to any such sale or transfer.
"(d) This Section shall be deemed of the essence of the Collective Bargaining Agreement and in the event of any violation, the no-strike provision of this Agreement shall not be applicable."

[2] While the NLRB sanctioned the fleet-wide rule as a general proposition in that and subsequent cases, on the particular facts of the Moore-McCormack Lines case it permitted an exception to the rule by in effect recognizing the existence of two separate fleets belonging to the same employer, one situate on the Pacific coast, and the other on the Atlantic and Gulf coasts.

newly-acquired vessels are generally considered as "accretions" to a fleet, with union representation of the crew passing to the union representing the newly augmented fleet. National Maritime Union of America [NMU] (Overseas Carriers Corp.), 174 NLRB No. 36, 70 LRRM 1153 (1969). This would apparently be the case despite the fact that an SIU employer, for example, might set up a new subsidiary or affiliate to own the vessel, so long as the ship was in fact to be operated under common direction with the rest of the fleet.

Commerce, in apparent ignorance of this fleet-wide representation rule, determined to sell both its vessels, without anticipation of labor jurisdictional problems which could thereby be created.[3] Fortuitously,

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[3] Vernitron, a self-styled "mini-conglomerate," had at that time recently acquired the stock of Commerce, and had had no previous maritime experience before the take-over. Its reason for selling the ships was necessity to raise cash to retire short-term indebtedness, rather than any problem arising from the operation of the vessels. Since the management of Commerce, who were experienced in maritime affairs, were themselves negotiating for purchase of at least one vessel, at the actual sale negotiations with Vantage and others, Commerce was represented by Vernitron personnel. (Cohen, Tr. pp. 68, 80-81.)

the sale of the first vessel was to an MMU company, so there was no incident. However, the second contract of sale, dated December 23, 1970, provided that the "Barbara" be sold to Vantage Steamship Corporation ("Vantage") for $2,750,000, with delivery set for February 28, 1971. Vantage recognized SIU as exclusive bargaining agent for seamen on all the vessels of the "Vantage group" fleet. (Corletta, Transcript of hearing held before the undersigned on June 4, 1971 ["Transcript"], pp. 32-34.)

Predictable problems then arose. MMU, interested in preservation of the job security and pensions of its members in an industry where changing technology and rising levels of automation have caused a diminution of employment opportunities with consequent strains on the MMU pension plan (Spector, Tr. pp. 100-106), refused to waive its rights. It did attempt to secure a purchaser for the "Barbara" who was under contract with MMU, to whom Vantage could have assigned its contract, but these efforts proved unsuccessful.

Vantage, for its part, was apprehensive, with reason, of difficulties with SIU, so it refused to give any undertaking to protect MMU jurisdiction over the berths aboard the Barbara

should
after she/become a Vantage ship. Since an alternative charter for the vessel had already been arranged, Vantage also refused to rescind the contract of sale. (Cardenas, Tr. pp. 43-57, and exhibits cited therein.)[4]

Commerce was therefore faced with a dilemma: it could be held in breach of one contract (with IMC) or another (with Vantage) whether it proceeded with the sale or not.

But the choice was not left up to Commerce. On January 25, 1971, IMC instituted arbitration proceedings which resulted on February 8, 1971, in an award in its favor and against Commerce. The permanent arbitrator found that the sales contract by Commerce was a violation of its agreement with IMC because the assignment of Vantage, as required by the IMC contract, were not (and in fact could not) be obtained. The arbitrator refrained from consideration of the validity of the contractual provisions relied upon.

[4] Subsequent events, such as the expiration of the cancellation date in the charter party, might have influenced Vantage to change its position in this respect. See Cardenas, Tr. p.47, Colen, Tr. p. 69. This comment is obviously without prejudice to an independent determination of the facts in the pending arbitration proceedings, noted infra, or any possible subsequent legal actions arising out of them.

On February 9, 1971, MEU commenced an action against Commerce to enforce the award by an injunction of this Court. On notice to Commerce, Hon. Inzer B. Wyatt of this Court temporarily restrained the transfer. Subsequently, on Friday, February 19, 1971, Judge Wyatt filed an opinion allowing the intervention of Vantage as a defendant, and granting its application for the dissolution of the restraining order, upon compliance with certain conditions therein enumerated. An order to that effect was entered on Monday, February 22, 1971.

However, on February 23, 1971, before performance of the required conditions had been completed, MEU's motion for a preliminary injunction was argued to Hon. Marvin E. Frankel. Judge Frankel, having been apprised of the impending February 28 transfer date, "revived" the temporary restraint by orders of February 24 and 25. Subsequently, by an opinion dated March 2, 1971, and subsequent order, Judge Frankel granted a preliminary injunction against the transfer or any transfer in violation of the agreement with MEU. An appeal by Commerce and Vantage is presently pending from that decision, the order entered in connection therewith, and the denial of an application to resettle that order.

When Vantage sought and obtained permission from Judge Wyatt to intervene in MMU's action then pending before him, it also filed a charge with the NLRB, on February 26,1971, alleging that MMU and Commerce were engaging in an "unfair labor practice" within the meaning of Section 8(e) of the National Labor Relations Act ("the Act"), 29 U.S.C. § 158(e). The Acting Regional Director for the Second Region of the NLRB, to whom this charge was referred, eventually determined that reasonable cause existed to believe that an unfair labor practice was in fact occurring, and that the effectuation of the public policy expressed in the Act required the injunctive protection of this court. Accordingly, under the procedure mandated by 29 U.S.C. 160(1), this court was petitioned on May 24, 1971 to grant appropriate relief against MMU pending the final adjudication of the matter by the NLRB itself. An amended petition filed in court on June 1, 1971 added Commerce as a second respondent. The motions for a preliminary injunction by NLRB, and to vacate Judge Frankel's preliminary injunction, by Commerce (without opposition from Vantage), came on before the undersigned on June 2, 1971. A hearing was scheduled and held on June 4, 1971.

To complete the procedural picture, the court was advised at the hearing that the arbitration clause in the contract

for the sale of the "Barbara" has now been invoked, and accordingly, Commerce and Vantage are in the process of arbitrating their claims against each other. (Carleton, Tr. p. 58.)

In summary, it can be seen that there are three co-incident but separate disputes continuing among the parties. These are:

(1) Arbitration and now litigation by IBU to enforce its contractual rights with Commerce ("IBU v. Commerce and Vantage").

(2) Proceedings before the NLRB, Vantage being the charging party ("NLRB 'for Vantage' v. IBU and Commerce").

(3) Proceedings to determine Vantage's rights vis-a-vis Commerce ("Vantage v. Commerce").

Before the present motions, each of the above matters had proceeded independently of the others. The undersigned is the first judge either to have heard testimony or to have had two of the three disputes sub judice at one time. However, it is still premature for an omnibus determination of all parties' rights as presented by all three disputes. While "clearing the air" may simplify the determination of Vantage's rights against Commerce, that matter is not now before this or any court. The only items before this court, which will now be considered, are, first, the NLRB motion, and second, the petition to vacate the preliminary

II

THE NLRB ACTION

Initially, the nature of the charge against IBU should be explained. IBU has been charged with violation of Section 8(e) of the National Labor Relations Act, 29 U.S.C. 158(e).[5] Section 8(e) is designed to reinforce the secondary boycott provisions of Section 8(b)(4). It restricts, inter alia,

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[5] Section 8(e) reads as follows:

"(e) It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void: . . ."

Section 8(b)(4) provides that it shall be an unfair labor practice for a union:

"(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object there is:

. . .

"(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor or manufacturer, or to cease doing business with any other person * * * Provided, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike * * *."

entry into so-called "hot cargo" agreements -- agreements requiring the signatory employer to refrain from doing business with or handling the goods of a neutral, "secondary" employer.

However, a gloss on the statute has added the requirement that no injunction should issue unless it has been established that the union's purpose in bargaining for the agreement or in acting to enforce it was to satisfy objectives other than preservation of the work or work standards of the union members in the bargaining unit. Work preservation itself must always be regarded as a "primary," lawful objective. Woodwork Manufacturers v. NLRB, 386 U.S. 612, 644-645 (1967); See concurring opinion of Judge Leonard P. Moore, NLRB v. Local Union No. 28, Sheet Metal Workers, 380 F. 2d 827 at 831 (2d Cir. 1967).

Whatever the tendency may be in the cases to categorize contractual terms, it is the reasonable intent of the parties, not the language chosen, which is determinative.

> "To conclude that a contract term falling within the letter of § 8(e) properly falls within its prohibition, there must be either a finding that both parties understood and acquiesced in a secondary object for the term, or a finding that secondary consequences within § 8(e)'s intendment would probably flow from the clause, in view of the economic history and circumstances of the industry, the locality, and the parties." [footnotes omitted] Meat and Highway Drivers, etc. v. NLRB, 335 F.2d 709, 716 (D.C. Cir. 1964.)

It should be noted in this regard that more than six months have passed since the signing of the MMU-Commerce collective bargaining agreement. If any unfair labor practice is to be found, it must be in the economic action taken or threatened to maintain and enforce the terms of that agreement in the particular circumstances of this case, rather than in the mere signing of it. 29 U.S.C. 160(b); NLRB v. Local Union No. 28, Sheet Metal Workers, 380 F. 2d 827, 829-830 (2d Cir. 1967). The intent of MMU therefore becomes particularly important.

An analogy may be drawn between the present case, which involves transfer of facilities from one employer to another, and cases involving subcontracting of part of one employer's work by another; the subcontracting situation being more common, has precipitated more case law.

The cases hold that provisions in collective bargaining agreements which limit subcontracting to employers whose employees recognized or were signatory to contracts with the primary contractor's union are unlawful "signatory" agreements. However, provisions which prohibit all subcontracting, or which require maintenance of the same work standards by the subcontractor as had been agreed upon by the primary employer are valid attempts to preserve jobs and working conditions of employees already

in the bargaining unit, and are upheld as "unit preservative." Kennedy v. Sheet Metal Workers Local 103, 289 F. Supp. 65 (C.D. Calif. 1968); Maynard v. Local 282, Intl. Bhd. of Teamsters, etc., 275 F. Supp. 19 (E.D.N.Y. 1967); See Local 1976, United Bhd. of Carpenters, etc. v. NLRB ("Sand Door"), 357 U.S. 93 (1958) (Before enactment of § 8(e)).

Turning to the particular facts, the court concludes that on this record the motivation of the NMU in negotiating and enforcing the collective bargaining agreement with Commerce, and with the other tanker operators as well, was to preserve as many of the declining number of jobs as possible for NMU seamen. Its paramount desire was the traditional and valid one of protection of the "job pool" and the pension plan and other elements of job security of of its members in the face of increasing automation. It does not appear to have had the objective of supplanting SIU in whole or part as bargaining agent with Vantage. Nor was there any other dispute between NMU and Vantage upon which motivation for secondary activities could be predicated.[6]

[6] But see Cohen, Tr. p. 72. Since the undersigned is in agreement with Judge Frankel in so far as evaluation of NMU motivation is concerned, issues of stare decisis do not arise. See infra. The nature of the present motions are such that collateral estoppel is clearly not present.

But this does not resolve the issues presented. It must still be determined whether the NMU was seeking to protect work at least fairly claimable by members in the particular bargaining unit affected by the proposed sale of the "Barbara," or whether the work of union members outside the relevant bargaining unit was also sought to be protected. If the latter be the case, the activities were still secondary as being "'work acquisition' not 'work preservation,'" directed against secondary employers. Meat and Highway Drivers v. NLRB, 335 F. 2d 709, 713 (D.C.Cir. 1964). The question, then, concerns the size of the bargaining unit; whether all NMU employers were included, or only the Commerce "fleet."

The testimony on this issue showed that the actual negotiations leading up to what was a uniform contract were held between NMU and, essentially, the Tankers Service Committee, a voluntary association of tanker companies organized for the purpose of collective bargaining. The Committee was formed and the negotiations conducted as they were in order to reduce the confusion attendant upon labor negotiations in this industry. The Committee represents about half of the operating companies with which NMU has agreements, but does not have power to bind any

of its members. Dry cargo ship operators' negotiations are separately conducted.

All tanker operators were individually invited to attend the negotiating sessions; most of the smaller independents, including Commerce, did not bother. Rather, they later signed the agreement therein negotiated, which the MMU presented to all companies on a "take it or leave it" basis. (See Spector, Tr. pp. 95-100.)

It will be seen, therefore, that the negotiations, as opposed to the actual contract signatures, were on an industry-wide basis. On the other hand, each fleet was separately contracted for. And, of course, each ship was operated by management as a discreet "work unit." See Intl. Union, United Mine Workers, etc. v. NLRB, 399 F. 2d 977, 979-980 (D.C. Cir. 1968). The "bargaining unit," as opposed to the various other units, appears to be that segment of the tanker industry which recognizes MMU.

This determination is, of course, a preliminary one. Final decision of the appropriateness of a multi-employer

bargaining unit is an issue "of fact and policy reserved for the Board [the NLRB]," Lewis v. NLRB, 350 F.2d 801, 803 (D.C. Cir. 1965); 29 U.S.C. 159(b).[6a] However, some

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6a The following excerpt from the Sixteenth Annual Report of the NLRB, quoted in Cox & Bok, Labor Law, Seventh Edition (1969), at 336-337, summarizes the applicable criteria:

"Generally, the Board will find that such a unit is appropriate if there is a controlling bargaining history on a multiemployer basis. For this purpose, neither the lack of a formal association of employers nor the fact that the results of joint negotiations have been incorporated in separate uniform contracts is determinative.

"The inclusion of employees in a multiemployer unit depends primarily on whether the employer intends to be bound, or is in fact bound, by joint negotiations. Thus, in one case during the past year, the Board said "'It is the participation for a substantial period of time in joint bargaining negotiations and the uniform adoption of the agreements resulting from such negotiations that indicates a desire on the part of the participants to be bound by joint, rather than individual, action and warrants the establishment of the multiemployer unit.'

"Since the employer's participation in joint negotiations is the determining factor, it is not necessary that he agree in advance to be bound by any contract which may be jointly negotiated. Conversely, the mere adoption by an employer of contracts negotiated by an employer group will not be held to require the inclusion of his employees in the multiemployer unit.

"However, an employer's intention to be bound by the joint negotiations of an association is not sufficient where the employer is not a member of the association and the association will act as bargaining agent only for its members.

elaboration of reasoning underlying this determination is desirable.

The explanation for this finding is to be found in the nature of the industry, as viewed by the union, rather than in the nature of the formalities of contract

"A history of multiemployer bargaining, nevertheless, is not necessarily controlling. Thus, where negotiations with a multiemployer committee resulted in contracts which were applicable only to members of the contracting union, a panel majority of the Board said
"'Although the Board has sometimes accepted a member's only contract as indicative of the feasibility of the scope of the unit, traditionally the Board has refused to give controlling weight to such a bargaining history, for such history does not afford the kind of representation nor establish such a bargaining unit as the Act contemplates. In particular, it has been our policy not to permit such history to preclude the establishment of a unit such as the one involved herein, which is inherently appropriate. [Footnotes omitted.]'
"Moreover, a multiemployer bargaining history will not be held to require inclusion of employees in the multiemployer unit if their employer has effectively abandoned joint bargaining. Thus, where one member of an employer group in the course of negotiations stated that it would not join in any further group bargaining, and thereafter did not enter into any written contracts with the union involved, the Board applied the rule that 'if an employer at an appropriate time, manifests an unequivocal intent to pursue an individual course in his labor relations, a unit limited to his employees alone becomes appropriate.'" [Footnotes omitted.]

signature. All hiring is done through a central hiring hall. Job opportunities and job security for all MMU seamen depend directly upon the number of berths filled through the MMU halls. To view one vessel or one fleet as an appropriate unit for bargaining purposes, from the MMU viewpoint, would be to acquiesce in a dangerous fiction. For it is absolutely essential to the union, in order to implement the pension plan and the seniority system, that all berths on MMU vessels be fungible. Pensions and seniority, important elements of the collective bargaining agreement, were clearly arrived at after industry-wide consultations. It was because an industry-wide agreement on pensions and seniority was essential that the MMU made the efforts it did to obtain the presence of all employers or their representatives at the negotiations. The fact that Commerce and some others took "free rides" on the efforts of the Tanker Service Committee does not mean that they separately negotiated their contracts in any real sense.

The conclusion must therefore be that, under the applicable standards as established by the NLRB, a multi-employer bargaining unit is appropriate in the present

circumstances, leaving final decision on this issue to the NLRB itself. Accordingly, under the procedural standards, see Kennedy, supra, 289 F. Supp. at 84, et seq., the burden of proof upon the Regional Director has not been met. A preliminary injunction would be unwarranted, on the present facts, and might cause greater hardship than it would cure.

III

One other issue remains for decision. At the present time the tanker "Barbara" lies idle, becalmed, at the eye of a large legal storm, so to speak. It might well be years before final adjudication is had of all issues now raised. Cognizant of this possibility, Commerce has moved to vacate the preliminary injunction previously issued by Judge Frankel, on the ground of changed circumstances. MMU, but not Vantage, opposes this relief.

After March 4, when the injunction was issued, the determination of the Regional Director of NLRB that a complaint should issue against MMU and Commerce for attempted implementation of the clause (which Commerce and Vantage are presently enjoined from violating) did in fact significantly alter the parties' situation. A new "party" --

the NLRB, has in effect intervened in the dispute, and has raised a new and preeminent issue; the public interest. If the NLRB should succeed in its contention that the clause is void as against public policy expressed in the labor laws, justice would require that NMU be prohibited from continuing to enforce the clause against Commerce and Vantage. But before all questions can be decided, the parties might have to endure proceedings requiring years for their completion; the cases cited in Part II of this opinion indicate the time factors sometimes involved.

Should the injunction remain in effect, and it eventually be determined that the NLRB position is well-taken, the effect will have been that employees registered at SIU hiring halls were improperly denied employment opportunities for the period of the injunction. On the other hand, should the injunction now be vacated, and the NMU position eventually be vindicated against the NLRB, Commerce, and Vantage, the effect will have been that NMU employees were improperly denied employment, assuming that a sale of the "Barbara" to Vantage or another SIU employer does eventuate.

The potential long-range effect on the pension plans of the two unions, and on other aspects of their respective collective bargaining agreements, will also correspond, with similar damage being done to SIU or to MM, depending on whether or not the injunction remains in effect. In fact, the potential damage to MM might be less than that to SIU, since a bond can be required to protect it against loss of pension fund contributions.[7]

SIU is not a party to these proceedings, but its interests are nevertheless intrinsically involved. When the interests of both unions are balanced, it appears that the potential for hardship from an erroneous determination of the propriety of maintenance of this injunction is approximately equal. The only difference is which union will be forced to run the risk.

However, from the point of view of the companies, the severity of the present economic hardship being incurred because of the injunction is severe and avoidable.

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[7] This is not to intimate any opinion binding at a later stage of these proceedings on the respective rights of SIU and MM as against each other. See John Wiley & Sons v. Livingston, 376 U. S. 543, 548, 551 (1964).

Accordingly, after a complete review of the augmented record, and having received the benefit of an extensive testimonial hearing, the court now finds that the balance of equities favors the granting of the motion to vacate the preliminary injunction.

The conditions of the vacatur are those stated by Judge Wyatt:

> A sufficient bond will be posted to cover contributions to the IWU pension fund for the time the "Barbara" is not operated under the Commerce-IWU agreement.
>
> An undertaking will be filed by Vantage that if IWU succeeds in this action, Vantage will put IWU in the same position as it would have been in had the [injunction] been continued.[8]
>
> Settle order on notice.

Dated: New York, N. Y.
June 22, 1971

THOMAS F. CROAKE
U. S. D. J.

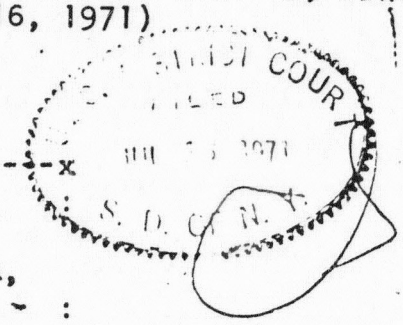
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[8] The necessity for this undertaking might be lessened by Vantage's apparent decision not to seek specific performance of the contract of sale. It nevertheless seems advisable, in caution, so as to let IWU,

> "if it succeeds in the litigation, to be in the same position it would be in were the award to be presently enforced,"

to quote Judge Wyatt again.

DECISION OF CROAKE, U.S.D.J. ON JULY 15, 1971 (71 CIV. 582)
(Filed July 16, 1971)



UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

NATIONAL MARITIME UNION OF AMERICA, AFL-CIO,

Plaintiff,

- v -

71-Civ. 582

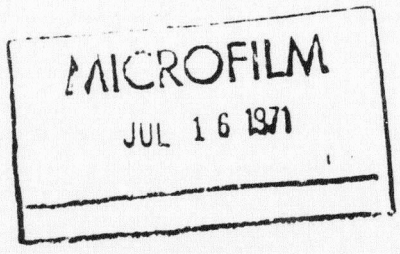
COMMERCE TANKERS CORPORATION,

Defendant,

- v -

VANTAGE STEAMSHIP CORP.,

Intervening Defendant.



APPEARANCES:

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CROAKE, D. J.

MEMORANDUM

NMU has now moved for reargument of the portion of this Court's opinion filed on June 22, 1971, which held that a preliminary injunction heretofore entered would be dissolved upon the satisfaction of certain conditions. NMU's main point in support of its motion for reargument is that the court lacked "jurisdiction" to modify an interlocutory order as to which an appeal was pending. This type of issue -- the power of a court to take a given action -- should be entertained at any time, despite any amount of tardiness in counsel for having failed to raise the issue at the time of the original decision. Accordingly, as soon as this Court was advised of counsel's intention to address this issue, the Court refrained from signing any order modifying the preliminary injunction, which therefore remains in effect at this time. The motion for reargument is granted.

Upon reargument, the Court is of the opinion that it does possess jurisdiction to modify the preliminary injunction. Rule 62(c), F.R.Civ.P., is unequivocal on this point:

> "(c) When an appeal is taken from an interlocutory . . . judgment granting, dissolving, or denying an injunction, the court in its discretion may suspend, modify, restore, or grant an injunction during the pendency of the appeal . . ."

The issue, then, is not, properly speaking, one of power to take action, but rather concerns the wisdom of doing so in light of its effect on the preservation of issues for appeal.

It will be noted in this regard that the above-quoted rule does not specifically include "vacating" an injunction among the powers explicitly reserved pending appeal, but rather uses the word, "suspend," which refers to staying enforcement rather than voiding. See Ohio Fuel Gas Co. v. City of Mt. Vernon, 37 Ohio App. 159, 174 N.E. 260, 262 (Ohio Ct. App. 1930).

The Court of Appeals for the Second Circuit has interpreted this Rule as authorizing only such action as would aid the appeal:

> "It was proper, to be sure, for Judge Bryan to take jurisdiction of the motion [to vacate or modify an earlier injunction] pursuant to Rule 62(c) . . . But this rule is described as 'merely expressive of a power inherent in the court to preserve the status quo where, in its sound discretion, the court deems the circumstances to justify.' 7 MOORE ¶62.05 . . .

". . . Once the appeal is taken, however, jurisdiction passes to the appellate court. Thereafter the appellant is not usually entitled as of right to present new evidence or argument to the trial court, which in the exercise of a sound discretion will exercise jurisdiction only to preserve the status quo as of the time of appeal. Appellant's proper procedure is then to request leave of the court of appeals to proceed in the lower court." Ideal Toy Corp. v. Sayco Doll Corp., 302 F.2d 623, 625 (2d Cir. 1962).

But see dissent in the above case by Clark, J. This case clearly establishes the rule for this district. Accordingly, the opinion of the court filed on June 22, 1971 is amended in the following particulars:

The language beginning with "After March 4" on page 21 of the opinion, and continuing through page 24, is omitted. In its place the following is inserted:

"However, the exercise of sound discretion requires that this court refuse to entertain new evidence of changed conditions in view of the pendency of an appeal from this injunction. The proper procedure would appear to be to seek leave of the Court of Appeals to present the evidence and argument concerning alleged changed conditions in this Court. Ideal Toy Corp. v. Sayco Doll Corp., 302 F. 2d 623, 625 (2d Cir. 1962). Accordingly, the motion is denied,

"without any opinion expressed as to the merits of the motion.

SO ORDERED."

One further comment is in order. The undersigned has determined, for the above reasons, not to consider modification of Judge Frankel's order while an appeal is pending and leave to move for modification or suspension of the order has not been sought from the Court of Appeals. No suggestion should be drawn from this memorandum or the original opinion, as now modified, about any opinion the undersigned might entertain regarding the propriety of continuing the preliminary injunction at this time.

SO ORDERED.

Dated: New York, N. Y.
July 15, 1971

Thomas F. Croake

THOMAS F. CROAKE
U. S. D. J.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NATIONAL MARITIME UNION OF AMERICA, AFL-CIO, Plaintiff-Respondent,	Docket No. 71-1460
-against-	
COMMERCE TANKERS CORPORATION, Defendant-Appellant,	71 Civ. 582 (S.D.N.Y.)
-against-	NOTICE OF MOTION
VANTAGE STEAMSHIP CORP., Intervening Defendant.	

S I R S :

PLEASE TAKE NOTICE that, upon the annexed affidavit of D. David Cohen, Esq., sworn to on the 20th day of July, 1971, and the exhibits annexed thereto, and upon all prior proceedings had herein, the undersigned will move this Court at the United States Courthouse, Foley Square, New York, New York, 17th Floor, at a date to be set for argument by the judges of this Court, the day of July, 1971, at o'clock, for an order pursuant to Rule 8(a) of the Federal Rules of Appellate Procedure suspending or modifying the order of injunction of the Hon. Marvin E. Frankel, dated March 4, 1971, which is on appeal before this Court in the following respects: (a) dissolving the injunction upon such conditions as the Court may deem just and proper, or (b) if the Court shall continue the injunction, increasing

the bond to be posted by the National Maritime Union of America, AFL-CIO to $2,750,000.

Dated: New York, New York
July 20, 1971

Yours, etc.

MARSHALL, BRATTER, GREENE,
ALLISON & TUCKER

By _____
A Member of the Firm

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71-1460 ORDER OF COURT OF APPEALS, 2nd CIRCUIT, DENYING FOREGOING MOTION (71 CIV 582) 191a

UNITED STATES COURT OF APPEALS

Second Circuit

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 18th day of August, one thousand nine hundred and seventy-one

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National Maritime Union of America, AFL-CIO,
Plaintiff-Appellee,

v.

Commerce Tankers Corporation,
Defendant-Appellant.

Vantage Steamship Corporation,

Intervening Defendant.

It is hereby ordered that the motion made herein by counsel for the appellant by notice of motion dated July 21, 1971 to vacate the injunction or, in the alternative, increase the bond to be posted by appellee to $2,750,000.00

~~appellant~~ ~~appellee~~ ~~petitioner~~ ~~respondent~~

~~by notice of motion dated~~

be and it hereby is ~~granted~~ denied without prejudice to the merits of the appeal.

It is further ordered that the appeal be expedited, that briefs of defendant-appellant and intervening defendant be filed on or before September 8, 1971, that appellee's brief be filed on or before September 27, 1971, that the appeal be heard the week of Oct. 4 ~~September 27~~, 1971, and that briefs and appendices may be in typewritten form.

It is further ordered that the motion, dated August 17, 1971, of Commerce Tankers Corporation, defendant-appellant, for an extension of time be disposed of in accordance with the above.

Wilfred Feinberg

William H. Mulligan

William H. Timbers Circuit Judges

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- -x

VANTAGE STEAMSHIP CORPORATION, :

Plaintiff, :

-against- : VERIFIED COMPLAINT

NATIONAL MARITIME UNION OF AMERICA, AFL-CIO, COMMERCE TANKERS' CORPORATION and VERNITRON CORPORATION, :

Defendants. :

- -x

The plaintiff above-named by Surrey, Karasik, Morse and Seham, its attorneys, as and for its Complaint alleges:

FOR A FIRST CAUSE OF ACTION

FIRST: This action arises under Section 15 of the Act of Congress of July 2, 1890, Ch. 647, 26 Stat. 209, as amended, 15 U.S.C., Section (1) et seq., entitled "An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies", commonly known as the Sherman Act, together with acts amendatory thereof and supplementary thereto, as hereinafter more fully appears. By reason of said controversy, the plaintiff seeks a declaration as to its rights in the premises pursuant to Section 274 (d) of the Judicial Code, and in addition further relief thereunder in the form of an injunction against the unlawful acts of the defendants hereinafter complained of, the plaintiff having no adequate remedy at law, and treble damages and costs and attorney's fees as provided by said Act.

SECOND: The plaintiff Vantage Steamship Corporation, (hereinafter referred to as "Vantage") is a corporation duly organized and existing by virtue of the laws of the State of New York and has its principal place of business at 11 Broadway, New York, New York.

THIRD: At all times material herein, Vantgage has owned and operated American flag freight ships engaged in the transportation of various goods and commodities in interstate and foreign commerce and derives an annual gross revenue from said operations in excess of one million dollars.

FOURTH: The defendant, National Maritime Union of America, AFL-CIO, (hereinafter referred to as "NMU") was and is an unincorporated association in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment or conditions of work.

FIFTH: The defendant, Commerce Tankers' Corporation, (hereinafter referred to as "Commerce") was and is a wholly-owned subsidiary of Vernitron Corporation and at all times hereinafter mentioned has owned and operated American flag freight ships engaged in the transportation of various goods and commodities in interstate and foreign commerce. Upon information and belief, Commerce's gross annual revenue from said operations exceeds Five Hundred Thousand Dollars ($500,000).

SIXTH: The defendant, Vernitron Corporation, (hereinafter referred to as "Vernitron") was and is a Delaware corporation with an office at Great Neck, New York, and at all times hereinafter mentioned was and is the parent corporation of Commerce, its wholly-owned subsidiary.

SEVENTH: At all times relevant herein the business affairs of Commerce were controlled and conducted by Vernitron, and its officers and employees; all major business decisions of Commerce including those respecting the sale of its vessels and the negotiations and administration of contracts with NMU were made and carried out directly by said Vernitron officers and employees; and Commerce at all times acted under the direction of and as agent for Vernitron.

EIGHTH: At all times material herein, Commerce has recognized the defendant NMU as the collective bargaining representative of the unlicensed crew employed aboard its vessels.

NINTH: Tankers Service Committee is an unincorporated multi-employer ship owners' association doing business as the collective bargaining representative of its members.

TENTH: Vantage was not at any time material herein a member of the Tankers Service Committee, nor did it authorize the Tankers Service Committee to bargain on its behalf at anytime material herein.

ELEVENTH: Beginning at least as early as July 1969, the exact date being unknown to plaintiff, and continuing thereafter up to and including the date of the filing of this complaint,

the defendants, Tankers Service Committee, and others unknown to plaintiff have been and are now engaged in an illegal contract, combination and conspiracy to restrain trade, monopolize, and attempt to monopolize trade and commerce in the sale and transfer of American flag cargo ships and in the transportation of goods and commodities by American flag cargo ships in interstate and foreign commerce in violation of the Sherman Act. The aforesaid contract, combination and conspiracy has consisted of a continuing agreement, understanding and concert of action among defendants to unreasonably restrain competition in the sale and transfer of American Flag cargo ships and in the transportation of goods and commodities in American flag cargo ships in favor of and for the benefit of American flag carriers who had contracts with and whose vessels were manned by the National Maritime Union, AFL-CIO. As part and parcel of and in furtherance of the aforesaid illegal contract, combination and conspiracy to restrain trade the defendants have committed, among others, the acts hereinafter set forth.

TWELFTH: In or about June, 1969, Tankers Service Committee and NMU negotiated and executed a collective bargaining agreement covering the unlicensed seamen employed by the member companies of the Tankers Service Committee. Upon information and belief the agreement entered into between NMU and Tankers Service Committee and the terms of such agreement are applicable to all NMU contracted vessels and companies.

THIRTEENTH: In July, 1969, NMU and Commerce, in furtherance of said illegal contract, combination and conspiracy, entered into a three-year collective bargaining agreement identical to the NMU and Tankers Service Committee contract alleged above, effective for the period June 16, 1969 to June 15, 1972, which contains in Article 1, Section 2 thereof, (which is annexed hereto as Exhibit A), provisions to the effect that in the event of a sale, Commerce would give NMU timely notice prior to the sale and obtain a written undertaking by the purchaser that it would recognize NMU as the bargaining agent for the vessel's unlicensed seamen and would accept the terms and conditions of the existing collective bargaining agreement.

FOURTEENTH: By Agreement dated December 23, 1970, Commerce contracted to sell its ship, the "SS BARBARA" to Vantage. The sale contract contained no provision for compliance with Article 1, Section 2 of the Commerce-NMU Collective Bargaining Agreement.

FIFTEENTH: At all times material herein, Vantage has recognized the Seafarer's International Union, (hereinafter referred to as 'the SIU') as the collective bargaining representative of the unlicensed crew aboard its vessels and its affiliated companies under contract with the SIU.

SIXTEENTH: By letter dated January 11, 1971, NMU by its Vice-President, Mel Barisic, wrote to Commerce directing its attention to the Article 1, Section 2 requirement. (See Exhibit B, attached hereto.)

SEVENTEENTH: By letter dated January 13, 1971, Commerce by its President, Milton Palelas, replied to NMU that negotiations for the sale of the vessel were made directly between Vernitron Corporation and the buyers and the broker for the sale, Blix-Mallory & Company, which brokerage company had been advised by Mr. Palelas that a condition of the sale of the "BARBARA" to Vantage was the continued manning of the vessel by the NMU. (See Exhibit C.)

EIGHTEENTH: In furtherance of said illegal contract, combination, and conspiracy, defendant Commerce by telegram dated February 6, 1971, notified Vantage that the sale could not be consummated absent the undertaking required by the aforesaid NMU labor contract.

NINTEENTH: In furtherance of said illegal contract, combination, and conspiracy, defendant NMU has insisted since on or about January 11, 1971 that any sale or transfer of the "BARBARA" to Vantage be only on condition that the purchaser agrees to utilize NMU Member employees.

TWENTIETH: By operation of the National Labor Relations Act, (hereinafter referred to as "the N.L.R.A."), Vantage was required at all times material herein to abide by the collective bargaining agreement between it and the SIU, referred to above, requiring that any ship acquired by it or an affiliated company be manned by SIU members and, thus, Vantage could not own any ship manned by NMU member employees.

TWENTY-FIRST: The demand referred to in paragraph NINETEENTH above was illegal and could not be acceded to by Vantage because of its previous contractual obligations to the SIU and obligations under the N.L.R.A.

TWENTY-SECOND: At all times Vantage has responded by rejecting any obligation to assume the NMU contract which was not part of its contract of sale with Commerce and which was violative of Section 8(e) of the N.L.R.A. and in restraint of trade.

TWENTY-THIRD: The National Labor Relations Board (hereinafter referred to as "the N.L.R.B."), on May 16, 1972, (Exhibit D) found that Commerce and the NMU had violated Section 8(e) of the N.L.R.A. and ordered NMU and Commerce to "cease and desist from entering into, maintaining, enforcing, or giving effect to Article 1, Section 2, of the Collective Bargaining Agreement entered into on July 1, 1969, between defendant NMU and defendant Commerce, or to any like or related clauses in any other collective bargaining contract whereby an employer agrees, in substance, to cease or refrain from doing business with any other person within the meaning of Section 8(e) of the Act."

TWENTY-FOURTH: The N.L.R.B. based its order on the grounds that the clauses were an improper attempt to insure that the purchasing employer be under contract with the NMU, i.e., union signatory clauses and not valid unit work preservation clauses as the NMU claimed and was therefore secondary and unlawful.

TWENTY-FIFTH: In furtherance of said illegal contract, combination and conspiracy defendant NMU, prior to the determination by the N.L.R.B., moved for arbitration and obtained an award from Theodore W. Kheel, who was the designated Arbitrator under its contract with Commerce and Vernitron, which, inter alia enjoined Commerce from selling the "BARBARA" to Vantage or any other purchaser without complying with Article 1, Section 2, of the NMU-Commerce Collective Bargaining Agreement.

TWENTY-SIXTH: In furtherance of said illegal contract, combination and conspiracy NMU, immediately following the rendering of Arbitrator Kheel's award, moved in the United States District Court to confirm such award.

TWENTY-SEVENTH: Since the inception of the confirmation proceeding by the NMU and until March 22, 1972 when the United States Court of Appeals for the Second Circuit vacated it, a temporary restraining order issued by the District Court barred Commerce from selling the "BARBARA" without complying with the requirements of Article 1, Section 2 of the Commerce-NMU Collective Bargaining Agreement.

TWENTY-EIGHTH: The temporary restraining order obtained by the NMU prohibited the transfer of the "BARBARA" to Vantage, which prohibition caused Vantage to immediately lose a long-term charter of the "BARBARA" between Vantage and third parties under an existing contract whereby Vantage lost profits of $1,800,000.

TWENTY-NINTH: In furtherance of said illegal contract, combination, and conspiracy on or about February 10, 1971, Commerce instituted arbitration proceedings against Vantage

pursuant to an arbitration clause contained in the Commerce-Vantage Contract of Sale.

THIRTIETH: Vantage resisted arbitration and moved for a stay of arbitration in the Supreme Court in the State of New York, whereupon Commerce successfully crossmoved to compel arbitration.

THIRTY-FIRST: In furtherance of said illegal contract, combination, and conspiracy Commerce obtained in its favor against Vantage on July 9, 1971 an award in the amount of the full contract purchase price of Two Million Seven Hundred Fifty Thousand Dollars ($2,750,000.00) plus unspecified incidental damages amounting to One Hundred Thirty-three Thousand, Two Hundred and Sixty-Four Dollars and Ten Cents ($133,264.10) less the net proceeds to be realized from the sale of the "BARBARA", which sale Commerce was directed to make by the award.

THIRTY-SECOND: Upon information and belief, at the time of the arbitration award referred to in paragraph THIRTY-FIRST, and continuing to date, due to a drop in the market for tankers, the value of the "BARBARA" at all material times from July 9, 1971 to date is now far less than the original purchase price of Two Million Seven Hundred Fifty Thousand Dollars $2,750,000.00), and upon information and belief Commerce did sell the "BARBARA" to a company unrelated to plaintiff for approximately Seven Hundred Thousand Dollars ($700,000.00).

THIRTY-THIRD: The entire American flag fleet is divided into two major segments - those companies under contract with the

NMU and those under contract with the SIU (each of which represent approximately one-half of the existing companies) so that implementation of the aforementioned clauses in the NMU contracts will have the practical affect of halting vessel transfers from NMU contracted companies to SIU contracted companies.

THIRTY-FOURTH: The sale of vessels in the maritime industry is a common occurrence, such that in the years 1964 to 1971, upon information and belief, approximately 400 American flag vessels (ocean-going merchant ships of 1,000 gross tons and over) were sold from one U.S. company to another, an average of fifty (50) a year.

THIRTY-FIFTH: In furtherance of said illegal contract, combinations, and conspiracy Commerce threatens to secure a judgment confirming the arbitration award above described in paragraph THIRTY-FIRST hereof in the Supreme Court of the State of New York and to execute upon said judgment.

THIRTY-SIXTH: Such execution would severly disrupt the business operations of plaintiff and may result in its bankruptcy or liquidation.

THIRTY-SEVENTH: The direct effect of said illegal agreement, combination, and conspirary among the officers and employees of defendants NMU, Commerce, and Vernitron, and the Tankers Service Committee was aimed at restraining trade, monopolizing, and attempting to monopolize trade and commerce in the sale of ships in the American flag maritime industry and plaintiff Vantage expended $475,000 in defending its position in resisting defendants' said illegal contract, combination and conspiracy in connection with the aforementioned arbitration and legal proceedings.

THIRTY-EIGHT: The character of unlawful acts done and being done by the defendants pursuant to the contract, combination and conspiracy hereinbefore described is such that the respective property rights of the plaintiff to continue to engage in interstate commerce without molestation or interference have suffered and will suffer great and irreparable damage unless the above described agreement, combination and conspiracy and the acts done and being done by the defendants in furtherance thereof, be declared to be unlawful and, since the plaintiff has no adequate remedy at law, an injunction in the form hereinafter prayed for be granted.

THIRTY-NINTH: The plaintiff has complied with all valid obligations imposed upon it by the statutes of the U.S. with reference to the matters herein complained of, and has made all reasonable efforts to adjust the differences existing between it and the defendants hereinbefore described and any further efforts at settlement would be futile and unavailable with respect to any and all relief herein sought, and the denial of such relief will inflict greater injury upon the plaintiff than would be inflicted upon the defendants if granted.

FOURTIETH: The plaintiff repeats and realleges each and every allegation contained in paragraph FIRST through THIRTY-NINTH (except paragraphs ELEVENTH, THIRTEENTH, EIGHTEENTH, TWENTY-NINTH, THIRTIETH, THIRTY-FIRST, THIRTY-FIFTH, THIRTY-SIXTH, THIRTY-SEVENTH and THIRTY-EIGHTH) of this complaint with the same force and effect as if herein fully set forth.

FOURTY-FIRST: Beginning at least as early as July 1969, the exact date being unknown to plaintiff, and continuing thereafter up to and including the date of the filing of this complaint, the defendant, NMU and Members of the Tankers Service Committee, unknown to plaintiff, have been and are now engaged in an illegal contract, combination and conspiracy to restrain trade, monopolize, and attempt to monopolize trade and commerce in the sale and transfer of American flag cargo ships and in the transportation of goods and commodities by American flag cargo ships in interstate and foreign commerce in violation of the Sherman Act. The aforesaid contract, combination and conspiracy has consisted of a continuing agreement, understanding and concert of action among defendants to unreasonably restrain competition in the sale and transfer of American Flag cargo ships and in the transportation of goods and commodities in American flag cargo ships in favor of and for the benefit of America flag carriers who had contracts with and whose vessels were manned by the National Maritime Union, AFL-CIO. As part and parcel of and in furtherance of the aforesaid illegal contract, combination and conspiracy to restrain trade the defendant NMU has committed, among others, the acts hereinafter set forth.

FOURTY-SECOND: In July, 1969, NMU, in furtherance of said illegal contract, combination and conspiracy, entered into a three-year collective bargaining agreement identical to the NMU and Tankers Service Committee contract alleged above with Commerce, effective for the period June 16, 1969 to June 15, 1972, which contains in Article 1, Section 2 thereof, (which is annexed hereto as Exhibit A), provisions to the effect that in the event of a sale, Commerce would give NMU timely notice prior to the sale and obtain a written undertaking by the purchaser that it would recognize NMU as the bargaining agent for the vessel's unlicensed seamen and would accept the terms and conditions of the existing collective bargaining agreement.

FOURTY-THIRD: As a direct result of said illegal contract, combination, and conspiracy plaintiff was held liable for damages in the amount of the full contract price of the "BARBARA" of Two Million Seven Hundred Fifty Thousand Dollars ($2,750,000) plus unspecified incidental damages amounting to One Hundred Thirty-Three Thousand, Two Hundred and Sixty-Four Dollars and Ten Cents ($133,264.10) (less the net proceeds to be realized from the sale of the "BARBARA"), incurred loss of profits on the charter of the "BARBARA", and incurred consequential damages, all as previously alleged in paragraphs TWENTY-EIGHTH through THIRTY-SEVENTH hereof.

FOURTY-FOURTH: As a direct consequence of said illegal contract, combinations, and conspiracy Commerce threatens to secure a judgment confirming the arbitration award above described in paragraph FOURTY-THIRD thereof in the Supreme Court of the State of New York and to execute upon said judgment.

FOURTH-FIFTH: Such execution would severely disrupt the business operations of plaintiff and may result in its bankruptcy or liquidation.

FORTY-SIXTH: The direct effect of said illegal agreement, combination, and conspiracy among the officers and employees of defendant NMU and Members of the Tankers Service Committee, unknown to plaintiff, was aimed at restraining trade, monopolizing, and attempting to monopolize trade and commerce in the sale of ships in the American flag maritime industry.

FORTY-SEVENTH: The character of unlawful acts done and being done by the defendant NMU pursuant to the contract, combination and conspiracy hereinbefore described is such that the respective property rights of the plaintiff to continue to engage in interstate commerce without molestation or interference have suffered and will suffer great and irreparable damage unless the above described agreement, combination and conspiracy and the acts done and being done by the defendant NMU in furtherance thereof, be declared to be unlawful and, since the plaintiff has no adequate remedy at law, an injunction in the form hereinafter prayed for be granted.

FOR A THIRD CAUSE OF ACTION

FOURTY-EIGHTH: The plaintiff repeats and realleges each and every allegation contained in paragraphs SECOND through TENTH, FOURTEENTH, and SIXTEENTH through THIRTY-SEVENTH of this Complaint with the same force and effect as if herein fully set forth.

FOURTY-NINTH: The Court has jurisdiction of this cause of action under the doctrine of pendent jurisdiction as the cause of action arises out of the same facts and circumstances as the earlier causes of action.

FIFTIETH: By contract, dated December 23, 1970, the plaintiff and the defendant, Commerce, entered into a written agreement for a good and valuable consideration whereby the plaintiff was to buy and the defendant, Commerce, was to sell, a vessel, the S.S. "BARBARA".

FIFTY-FIRST: On information and belief, at all times herein mentioned, the defendant, NMU, had due notice and knowledge of the aforesaid contract between the plaintiff and the defendant Commerce.

FIFTY-SECOND: Notwithstanding the fact that the defendant, NMU, had due notice and knowledge of the aforesaid contract between the plaintiff and the defendant, Commerce, it wrongfully, knowingly, intentionally, maliciously and without reasonable justification or excuse induced, persuaded and caused the said defendant, Commerce, to violate, repudiate, and break the said agreement with the plaintiff and to refuse to proceed

further thereunder.

FIFTY-THIRD: Notwithstanding the fact that the defendant, NMU, had due notice and knowledge of the aforesaid contract between the plaintiff and the defendant, Commerce, it wrongfully, knowingly, intentionally, maliciously, and without reasonable justification or excuse, demanded that Commerce refuse to deliver the "BARBARA" to Vantage pursuant to the Contract of Sale between Commerce and Vantage, knowing full well that said Contract of Sale did not contain any requirement that Vantage undertake to comply with Article I, Section 2 of the Commerce-NMU Collective Bargaining Agreement; and caused arbitration proceedings to be commenced under its collective bargaining agreement with the defendant, Commerce, based on an allegation that the said contract of Sale violated Article I, Section 2, of the said Collective Bargaining Agreement, which clause prohibited sale of a Commerce tanker to a purchaser unless such purchaser undertook an NMU labor contract, and which clause was null and void under Section 8(e) of the N.L.R.A.

FIFTY-FOURTH: The arbitrator in the said proceedings, to which the plaintiff was not a party, enjoined and restrained the defendant, Commerce, from selling and delivering the said vessel to plaintiff. Said arbitrator was selected by the defendants Commerce and NMU and refused to consider the legality under federal law of said clause.

FIFTY-FIFTH: By reason of the fact that the defendant, Commerce, in furtherance of the NMU's illegal demand and the various acts undertaken by the NMU as hereinabove described was induced to violate, repudiate, and break its said agreement with Vantage and fail to make timely transfer of title, Vantage was caused to lose a long-term charter of the "BARBARA", was held liable for the vessel's full purchase price of Two Million, Seven Hundred Fifty Thousand Dollars ($2,750,000) plus unspecified incidental damages amounting to One Hundred Thirty-three Thousand, Two Hundred Sixty-four Dollars and Ten Cents ($133,264.10) by an award resulting from the commercial arbitration instituted by Commerce and to sustain the loss of market value with respect to the vessel, (less the amount received from the sale of the vessel) plus One Million Eight Hundred Thousand Dollars ($1,800,000) loss of profits, and consequential damages of Four Hundred and Seventy-Five Thousand Dollars ($475,000), all as previously alleged in paragraphs TWENTY-EIGHTH through THIRTY-SEVENTH hereof.

FOR A FOURTH CAUSE OF ACTION

FIFTY-SIXTH: This action arises under the Labor Management Relations Act of 1947, USCA §185 and 187, as hereinafter more fully appears.

FIFTY-SEVENTH: The plaintiff repeats and realleges each and every allegation contained in the paragraphs of this Complaint numbered SECOND through THIRTY-NINTH and FIFTIETH through FIFTY-FIFTH, with the same force and effect as if herein fully set forth.

FIFTY-EIGHTH: Section 8(b) (4) (ii) (A) of the N.L.R.A. provides that, "it shall be an unfair labor practice for a labor organization or its agents ... to threaten, coerce or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is forcing or requiring any employer ... to enter any agreement which is prohibited by Section 8(e).

FIFTY-NINTH: The said Section 8(b) (4) (ii) (A) comprehends an action by a labor organization or its agents of threatening, coercing, or restraining any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is to enforce an agreement which is prohibited by Section 8(e).

SIXTIETH: Section 8(b) (4) (ii) (B) of the N.L.R.A. provides that, "it shall be an unfair labor practice for a labor organization or its agents ... to threaten, coerce or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is ... forcing or requiring any person ... to cease doing business with any other person ..."

SIXTY-FIRST: The action of the defendant, NMU, in undertaking to enforce, as set forth hereinabove, the aforementioned Article I, Section 2, of its Collective Bargaining Agreement with the defendant, Commerce, constituted an unfair labor practice within the definition of Section 8(b) (4) (ii) (A).

SIXTY-SECOND: The aforementioned Order of the N.L.R.B. of May 16, 1972 found that maritime industry buyers and sellers of ships are "doing business" within the meaning of Section 8(e) of the N.L.R.A., which term has an identical meaning as used in Section 8(b) (4) (ii) (B),

SIXTY-THIRD: The plaintiff, Vantage, and the defendant, Commerce, were a maritime buyer and seller doing business within the meaning of Section 8(b) (4) (ii) (B).

SIXTY-FOURTH: The actions of defendant, NMU, as aforesaid, in enforcing the aforementioned Article I, Section 2, of its Collective Bargaining Agreement with the defendant, Commerce, had as an object the forcing or requiring of the defendant, Commerce, to cease doing business with the plaintiff, and constituted an unfair labor practice within the definition of Section 8(b) (4) (ii) (B).

SIXTY-FIFTH: Section 303 of the N.L.R.A., as amended, provides that whosoever may be injured by the actions of a labor organization engaging in any activity or conduct defined as an unfair labor practice in Section 8(b) (4) may sue in any district court in the United States or in any other court having jurisdiction of the parties to recover damages suffered by him and the cost of the suit.

SIXTY-SIXTH: The said violations of Sections 8(b) (4) (ii) (A), 8(b) (4) (ii) (B) and 8(e) give rise to a cause of action by the plaintiff for the injuries and damages suffered by it as alleged herein and for the cost of the suit under the aforementioned Section 303 of the N. L. R. A., as amended.

SIXTY-SEVENTH: By reason of the foregoing violations of the N.L.R.A., plaintiff was held liable for the full purchase price of the "BARBARA" and incidental damages, plaintiff lost a valuable charter, and incurred consequential damages, all as previously alleged in paragraphs TWENTY-EIGHTH through THIRTY-SEVENTH hereof.

FOR A FIFTH CAUSE OF ACTION

SIXTY-EIGHTH: This action arises under the provisions of Section 340 of the General Business Law of the State of New York. The Court has jurisdiction under the doctrine of pendent jurisdiction.

SEVENTIETH: The plaintiff repeats and realleges each and every allegation contained in the paragraphs of this Complaint numbered SECOND through THIRTY-NINTH, with the same force and effect as if herein fully set forth.

SEVENTY-FIRST: Section 340(1) of the General Business Law of the State of New York provides:

> 1. Every contract, agreement, arrangement or combination whereby
>
> A monopoly in the conduct of any business, trade or commerce or in the furnishing of any service in this state, is or may be established or maintained, or whereby
>
> Competition or the free exercise of any activity in the conduct of any business, trade or commerce or in the furnishing of any service in this state is or may be restrained or whereby
>
> For the purpose of establishing or maintaining any such monopoly or unlawfully interfering with the free exercise of any activity in the conduct of any business, trade or commerce or in the furnishing of any service in this state any business, trade or commerce or the furnishing of any service is or may be restrained, is hereby declared to be against public policy, illegal and void.

SEVENTY-SECOND: The action of the defendants, NMU and Commerce, as set forth in paragraphs TWELFTH through THIRTY-NINTH hereof, in entering into, giving effect to, and in undertaking to enforce the aforementioned Article 1, Section 2, of the Collective Bargaining Agreement with the defendant, Commerce, constitute an illegal agreement, arrangement, and combination, (1) establishing and maintaining a monopoly, and (2) in restraint of trade and commerce within the meaning of the aforementioned Section 340 of the General Business Law of the State of New York.

SEVENTY-THIRD: By reason of the said illegal agreement, arrangement and combination between defendants, NMU and Commerce, plaintiff was held liable for damages in the amount of the full contract purchase price for the "BARBARA" of Two Million Seven Hundred Fifty Thousand Dollars ($2,750,000) plus unspecified incidental damages amounting to One Hundred Thirty-Three Thousand, Two Hundred and Sixty-Four Dollars and Ten Cents ($133,264.10) (less the net proceeds from the sale of the "BARBARA"), incurred loss of profits on the charter of the "BARBARA", and incurred consequential damages, all as previously alleged in paragraphs TWENTY-EIGHTH through THIRTY-SEVENTH hereof.

WHEREFORE, the plaintiff demands judgments against the defendants as follows:

A. That this Court declare the said conspiracy and all the acts done and being done in furtherance thereof as aforesaid to be unlawful and in violation of the Act of Congress of July 2, 1890, entitled "Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies", commonly known as the Sherman

Anti-Trust Law, as amended and supplemented.

B. That as and for further relief (there being no adequate remedy at law), the defendants NMU, Commerce and each of their officers, agents, servants, attorneys, and confederates and members of said NMU, and all persons acting in behalf of or in conjunction with them, or any of them, be perpetually enjoined and restrained from in any manner combining and conspiring to obstruct, restrain or interfere with the interstate trade or commerce of the plaintiff by:

(a) Inducing, seeking, or attempting to induce any person, firm or corporation to refrain from selling or from agreeing to sell ships to said plaintiff.

(b) Inducing, seeking, or attempting to induce, any person, firm or corporation to refrain from performing or carrying out any contract, agreement or understanding whether oral or in writing for the sale of any American flag vessel to plaintiff.

(c) In any manner whatsoever diverting, seeking, or attempting to divert from the plaintiff, any business, contract or orders for or relating to the aforesaid vessels upon the ground that the manning of such vessels is wholly or partially required to be done by members of the defendant NMU.

(d) In any manner or by or through any acts or means preventing the plaintiff from securing orders for the purchase of vessels as aforesaid.

(e) Inducing, ordering or in any manner or through any means or methods requiring any shipowner or other possible or potential purchaser of American Flag vessels to execute or enter into, observe, carry out or perform any contract agreement or understanding which in substance or effect requires such shipowner or purchaser not to deal with the plaintiff.

(f) Inducing, ordering, directing or requiring any person or firm to refuse to handle any cargo carried on any vessel owned by the plaintiff.

(g) Adopting, promulgating, maintaining, or enforcing any rule or regulation forbidding members of the defendants or any of them to unload or work upon any vessel owned by plaintiff and from finding, compelling or otherwise disciplining any of said members for disobeying any such rule or regulation.

(h) Inducing, ordering, directing, requiring any person or persons not to handle, work on, unload or maintain any vessel owned by plaintiff unless the plaintiff has agreed to the aforesaid contract clause.

(i) Inducing, ordering, directing, or requiring any person or persons to enforce or execute upon any judgment, order, or award obtained in furtherance of the illegal contract, combination, or conspiracy herein above described.

C. That a temporary injunction of the same tenor and effect as the permanent injunction herein prayed for issue out of this court to continue in full force and effect until and during the trial of this action.

D. That defendants severally be ordered to pay compensatory damages to plaintiff in the amount of Four Million, Four Hundred and Fifty-Eight Thousand, Two Hundred and Sixty-Four Dollars and Ten Cents ($4,458,264.10).

E. That defendants severally be ordered to pay treble damages upon the amount specified above by reason of defendants' acts, as provided in said Sherman Anti-Trust Act, as amended and supplemented, in the amount of Thirteen Million, Three Hundred and Seventy-Four Thousand, Seven Hundred and Ninety-Two Dollars and Thirty Cents ($13,374,792.30).

F. That defendants severally be ordered to pay punitive damages in the amount of Ten Million Dollars ($10,000,000).

G. And that the plaintiff recover its costs, disbursements and attorney's fees in this action, and have such other and further relief as to this Court may seem just and proper.

SURREY, KARASIK, MORSE AND SEHAM

/s/ Surrey, Karasik, Morse and Seham by Martin D. Seham

Attorney for Plaintiff
500 Fifth Avenue
New York, New York 10036
212/239-7200

STATE OF NEW YORK)
) SS.:
COUNTY OF NEW YORK)

PHILIP T. CORLETTA, being duly sworn, deposes and says:

That he is the President of Vantage Steamship Corp., Plaintiff herein, that being the facility which is the subject of this action, and that he is the plaintiff's authorized agent in respect thereof.

That he has read the foregoing complaint and knows the contents thereof, that the same is true to the knowledge of the deponent. Deponent further says that the reason this verification is made by deponent and not by plaintiff is that plaintiff is a domestic corporation and deponent is its authorized agent.

/s/ Philip T. Corletta
Philip T. Corletta

Sworn to before me this
30th day of October , 1972

/s/ Molly D. Rodriguez
Notary Public

EXHIBITS ANNEXED TO FOREGOING COMPLAINT

EXHIBIT A - PROVISIONS OF ARTICLE I, SECTION 2 OF COLLECTIVE BARGAINING AGREEMENT

E X H I B I T A

Section 2. Sale and Transfer of Vessels:

(a) The Company agrees with respect to any vessel which is presently under or may hereafter come under this Agreement, that if during the term of this Agreement said vessel is sold or transferred in any manner to any other business entity not covered by this Agreement for operation under United States flag (but not including a vessel which the Company bareboat charters and the charter is terminated), said vessel shall be sold or transferred with the complement of employees who either are or shall be provided by the Union in accordance with the terms of this Agreement, or such number as may be agreed upon between the Union and the transferee. The term "transfer" shall be construed to include any chartering of a vessel by the Company.

(b) The Company obligates itself to obtain for the benefit of the Union a written undertaking with the Union to be executed by the business entity to which the vessel has been sold or transferred that for the full term of the Agreement all of its terms and provisions shall apply to said vessel except as hereinabove provided and that said business entity will fully comply with all of the terms and provisions of this Agreement and any amendments thereto to preserve the jobs and job rights of the Unlicensed Personnel covered by this Agreement and to protect and maintain the wages, pension rights and other economic benefits and working conditions provided such personnel under this Agreement.

(c) The Company agrees that if it desires to sell, bareboat charter or in any manner whatsoever transfer a vessel to another business entity, whether for United States flag or foreign-flag registry, timely written notice to the Union must first be given prior to any such sale or transfer.

(d) This Section shall be deemed of the essence of the Collective Bargaining Agreement and in the event of any violation, the no-strike provision of this Agreement shall not be applicable.

EXHIBIT B - EXCERPT FROM LETTER DATED JANUARY 11, 1971 FROM NMU TO DEFENDANT

E X H I B I T B

It has come to our attention that you are contemplating the sale of the S/S BARBARA to another American-flag Steamship Company.

Your attention is directed to Article I, Section 2 of the Collective Bargaining Agreement which requires that you obtain from the purchasing company, as a condition of any sale, an agreement that the Collective Bargaining Agreement shall continue to apply to the vessel.

Please advise at once by return mail whether you are in fact contemplating the sale of the vessel, if so, to whom and what steps you are taking in compliance with the Collective Bargaining Agreement.

EXHIBIT C - EXCERPT FROM LETTER DATED JANUARY 13, 1971 FROM DEFENDANT TO NMU

EXHIBIT C

In reply to your letter of January 11, 1971, addressed to me as President of Commerce Tankers Corporation, I wish to advise that your tanker "THALIA" was sold and delivered to Texas City Refining, Inc. on December 23, 1970, and further, that a Contract of Sale has been entered into for the "BARBARA" to the Vantage SS Corporation for delivery scheduled sometime in February.

Commerce Tankers Corporation is a wholly-owned subsidiary of Vernitron Corporation, and the final negotiations for the sale of the vessels were made directly between Vernitron Corporation and the buyers through the brokerage firm of Blix-Mallory & Company. For your guidance, at the start of negotiations for the sale of these vessels I advised Mr. Blix of Blix-Mallory & Company that the same unions, including NMU, with which Commerce Tankers Corporation had collective bargaining agreements must continue to man the vessels after their sale, and that this was to be made a condition of the sale; and he assured me that this was fully understood and would be impressed on prospective buyers. I know that the same unions are continuing on the THALIA and have no reason to believe that it will be otherwise with the BARBARA.

EXHIBIT D

196 NLRB No. 165

D--6280
New York, N.Y.

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

NATIONAL MARITIME UNION OF AMERICA, AFL--CIO; COMMERCE TANKERS CORPORATION

and

Case 2--CE--44

VANTAGE STEAMSHIP CORPORATION

DECISION AND ORDER

On September 2, 1971, Trial Examiner Thomas A. Ricci issued the attached Decision in this proceeding. Thereafter, the General Counsel, Charging Party, and Intervenor [1] filed exceptions and supporting briefs; Respondent National Maritime Union filed a brief in opposition and Respondent Commerce filed a brief. On February 7, 1972, oral argument was held before the Board at which time all parties were represented and presented their positions.

The Board has considered the record and the Trial Examiner's Decision in light of the exceptions and briefs and oral argument and has decided to affirm the Trial Examiner's rulings, findings, and conclusions only to the extent consistent with the following.

Respondent Commerce Tankers Corporation (hereinafter called Commerce) is a New York corporation engaged in the business of

[1] The Board by order of January 6, 1972, granted the motion of Seafarers International Union of North America to intervene.

owning and operating American Flag freight ships used for transporting goods and commodities. In July 1969, Commerce entered into a 3-year collective-bargaining agreement with Respondent National Maritime Union (hereinafter called NMU) recognizing NMU as the exclusive bargaining agent for all unlicensed seamen employed on its vessels. Although it was not a member of any employer association for bargaining purposes, Commerce agreed to the same contract negotiated between the NMU and the Tankers Service Committee, a multiemployer association of ship owners. The contract also contained provisions, quoted in full in the Trial Examiner's Decision, to the effect that, in the event of a sale, Commerce would give NMU timely notice prior to the sale and obtain a written undertaking by the purchaser that it would recognize NMU as the bargaining agent for the vessel's unlicensed seamen and would accept the terms and conditions of the existing collective-bargaining agreement.

On December 23, 1970, Commerce entered into an agreement with Vantage Steamship Corporation,[2] the Charging Party, to sell its last remaining vessel, the SS Barbara.[3] This sales agreement contained no provision for compliance with "Article 1, Section 2" of the Commerce-NMU collective-bargaining agreement. When the NMU learned that Commerce had not complied with the terms of the collective-bargaining agreement, it demanded pursuant to said

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2/ Vantage is a shipping company operating approximately four tankers with its unlicensed seamen represented by the Intervenor, Seafarers International Union.

3/ Commerce's other vessel, SS Thalia, had previously been sold in compliance with the contract.

agreement arbitration of the dispute with Commerce. On February 8, 1971, the arbitrator issued an award [4] enjoining Commerce from selling the Barbara until Commerce complied with article 1, section 2, of the collective-bargaining agreement. [5]

In the interim, Commerce notified Vantage that the sale could not be consummated absent the undertaking required by the NMU labor agreement. [6] Vantage responded by rejecting any obligation to assume the NMU contract, noting that it was not part of the contract of sale, and filed unfair labor practice charges against both NMU and Commerce alleging violations of Section 8(e) of the Act. The Trial Examiner found that the contract clauses were lawful work preservation clauses saying "no more than the jobs of the employees covered by the contract could be saved for them in the event of a sale. . . ." He further found that Commerce's employees constituted a separate single-employer bargaining unit consisting of all seamen who are presently working or would in the future work on tankers of Commerce under the provisions of the hiring hall, and that the

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4/ As the arbitrator's award dealt solely with the interpretation of the contract and did not consider the unfair labor practice issue, the Board will not defer to this award. Monsanto Chemical Company, 130 NLRB 1097, 1099.

5/ This award was confirmed on March 2, 1971, and a preliminary injunction restraining Commerce from selling the vessel was issued. National Maritime Union of America v. Commerce Tankers Corporation, 325 F.Supp. 360 (D.C.N.Y., 1971). On appeal the injunction was vacated. See McLeod v. National Maritime Union [Prudential-Grace Lines, Inc.], F.2d (C.A. 2, March 17, 1972).

6/ Commerce on January 13 notified NMU in writing that the sale of the vessel would be in compliance with art. 1, sec. 2, of their contract. Accordingly, based on the above evidence, we find that Respondent Commerce reaffirmed this provision within 6 months of the filing of the charge herein.

BEST COPY AVAILABLE

MU had the lawful right to preserve this work. Accordingly, he found no violation of Section 8(e) and recommended dismissing the complaint. The General Counsel, Charging Party, and Intervenor have excepted to the Trial Examiner's findings, contending that the clauses had an object outside the scope of the appropriate bargaining unit and were secondary in nature. Accordingly, they contend that the clauses were being used to further union institutional interests and not to preserve the work for Commerce's present or dislocated employees.

We agree with the positions of the General Counsel, Charging Party, and Intervenor for the following reasons:

At the outset, it should be noted that in the maritime industry the sale of a vessel is a fairly common occurrence. Thus, in the years 1964 to 1971, approximately 400 American Flag vessels (ocean-going merchant-type ships of 1,000 gross tons and over) averaging 50 per year were sold from one U.S. company to another. 1/ Similarly, during this same period approximately 150 U.S. Flag vessels were transferred foreign, excluding vessels sold foreign for scrapping. Accordingly, the transactions involved herein do not represent a novel situation but occur in the normal course of doing business in the maritime industry. In these circumstances we conclude that in the maritime industry buyers and sellers of ships are doing business with each other within the meaning of Section 8(e). As it is unnecessary to our decision, we have not considered questions

1/ These statistics, of which we take administrative notice, are a matter of public record compiled by the U.S. Department of Commerce, Maritime Administration.

concerning the applicability of this section to the sale of capital assets in other industries or in other circumstances.

As the Supreme Court has stated, the basic question in determining if Section 8(e) has been violated is whether the "Union's objective was preservation of work for [unit] employees, or whether the agreements . . . were tactically calculated to satisfy union objectives elsewhere. . . . The touchstone is whether the agreement or its maintenance is addressed to the labor relations of the contracting employer vis-a-vis his own employees."[8] Thus, where an object of a clause is to aid union members generally rather than members of the unit, the object is secondary and unlawful.[9]

As the Trial Examiner recognized, these basic principles lead to the necessity of determining the scope and composition of the unit in question, and we agree with his conclusion that the appropriate unit is the single-employer unit and not a multiemployer or industrywide unit. And we can assume without deciding that this single-employer unit could include employees who may in the future be referred from NMU hiring halls to work on ships operated by Commerce. But such an assumption does not lead to the Trial Examiner's conclusion that the clauses in issue are lawful work preservation clauses which do no more than save the jobs of the employees covered by the contract in the event of a sale.

8/ National Woodwork Manufacturers Association v. N.L.R.B., 386 U.S. 612, 644-645.

9/ Meat and Highway Drivers, Local 710, Teamsters [Wilson & Co.] v. N.L.R.B., 335 F.2d 709, 716 (C.A.D.C.).

Thus, because of the unique nature of this industry, virtually all hiring is accomplished through hiring halls located in various ports. An employee is referred to a ship on a permanent basis and retains that position for as long as that ship operates out of the port of referral. However, when a ship is either sold, operated out of another port, or placed in layup status, the employees lose their jobs and a new crew is referred, either through the hiring hall in the new port or when placed back in service through the hiring hall in the old port.[10] As a practical matter therefore, in the light of this practice, although each ship has a permanent stable work force of employees assigned to it through the hiring hall, whom the Union clearly has a lawful interest in protecting against job loss, the clauses in question in fact do not protect those employees at all in the event of a sale, but instead, as here, serve to preserve those jobs for those other seamen who may be eligible for referral through the NMU hiring hall at the different port out of which the new owner is to operate. In these circumstances, these clauses place restrictions on sales which are not strictly "germane to the economic integrity of the principal work unit. . . ."[11] Instead they only insure that the purchasing employer is under contract with the NMU. Consequently, to conclude that these clauses are lawful would obliterate the distinction between unit

10/ When the vessel Thalia was sold by Commerce to an NMU signatory, for example, the Commerce crew left the ship and a new crew was referred from the hiring hall in the new port.

11/ Orange Belt District Council of Painters No. 48 [Calhoun Drywall Co.] v. N.L.R.B., 328 F.2d 534, 538 (C.A.D.C.).

work preservation and union signatory clauses and nullify the congressional purpose of Section 8(e).

Accordingly, on the basis of the foregoing considerations, we find that the NMU's work preservation argument is without merit and that the contract is not valid under Section 8(e) of the Act.[12/]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondents, National Maritime Union of America, AFL--CIO, its officers, agents, and representatives, and Commerce Tankers Corporation, its officers, agents, successors, and assigns, shall:

1. Cease and desist from entering into, maintaining, enforcing, or giving effect to article 1, section 2, of the collective-bargaining agreement entered into on July 1, 1969, between Respondent NMU and Respondent Commerce, or to any like or related clauses in any other collective-bargaining contract whereby an employer agrees, in substance, to cease or refrain from doing business with any other person within the meaning of Section 8(e) of the Act.

2. Take the following affirmative action:

12/ Although not germane to our decision, we do not adopt the Trial Examiner's interpretation of Moore-McCormick Lines, Inc., 139 NLRB 796. See National Maritime Union of America, AFL--CIO (Overseas Carriers Corporation), 174 NLRB 216, and National Maritime Union of North America, AFL--CIO (Prudential-Grace Lines, Inc.), 194 NLRB No. 199.

(c) Post at Respondent NMU's business offices and meeting halls and at Respondent Commerce's place of business copies of the attached notice marked "Appendix."[13/] Copies of said notice, on forms provided by the Regional Director for Region 2, after being duly signed by Respondents' representatives, shall be posted by Respondents immediately upon receipt thereof, and be maintained by them for 60 consecutive days thereafter, in conspicuous places, including all places where notices to members and employees are customarily posted. Reasonable steps shall be taken by Respondents to insure that said notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director for Region 2, in writing, within 0 days from the date of this Order, what steps the Respondents have aken to comply herewith.

Dated, Washington, D.C. MAY 16 1972

Edward B. Miler, Chairman

John H. Fanning, Member

Howard Jenkins, Member

Ralph E. Kennedy, Member

John A. Penello, Member

[13/] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

(Filed November 27, 1972)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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VANTAGE STEAMSHIP CORPORATION, : 72 Civ. 4619

Plaintiff, :

-against- : A N S W E R

NATIONAL MARITIME UNION OF AMERICA AFL-CIO, COMMERCE TANKERS CORPORATION and VERNITRON CORPORATION, :

Defendants. :

- x

Commerce Tankers Corporation, by its attorneys, Marshall, Bratter, Greene, Allison & Tucker, for its answer to the complaint herein states as follows:

ANSWER TO FIRST CAUSE OF ACTION

1. Denies every allegation contained in paragraph FIRST of the complaint.

2. Upon information and belief admits the allegations contained in paragraph SECOND of the complaint.

3. Denies having knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph THIRD of the complaint.

4. Upon information and belief admits the allegations contained in paragraph FOURTH of the complaint.

5. Admits the allegations contained in paragraph FIFTH of the complaint.

6. Admits the allegations contained in paragraph SIXTH of the complaint.

7. Denies every allegation contained in paragraph SEVENTH of the complaint.

8. Admits the allegations contained in paragraph EIGHTH of the complaint.

9. Upon information and belief admits the allegations contained in paragraph NINTH of the complaint.

10. Denies having knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph TENTH of the complaint.

11. Denies every allegation contained in paragraph ELEVENTH of the complaint insofar as they relate or refer to Commerce Tankers Corporation ("Commerce") or to Vernitron Corporation ("Vernitron").

12. Upon information and belief admits the allegations contained in paragraph TWELFTH of the complaint.

13. Denies every allegation contained in paragraph THIRTEENTH of the complaint insofar as they relate or refer to Commerce, and affirmatively alleges that Commerce was under a duty to bargain with the National Maritime Union of America ("NMU") imposed by the National Labor Relations Board ("NLRB") and that Commerce was precluded from having any economic choice as to the acceptance or rejection of the terms of the collective bargaining agreement required by the NMU. With respect to the provisions of the aforesaid collective bargaining agreement, Commerce refers thereto for proof of the contents and meaning thereof.

14. Admits the allegations contained in paragraphs FOURTEENTH and FIFTEENTH of the complaint and affirmatively alleges that plaintiff, Vantage Steamship Corp. ("Vantage"), entered into the contract of December 23, 1970 with Commerce with the actual knowledge of the fact that the Vessel SS. "Barbara" was covered by the industry-wide NMU collective

bargaining agreement and that Vantage's purchase of the Vessel would result in a union jurisdictional controversy with respect to the unlicensed crew to be employed by Vantage subsequent to the transfer of ownership of the Vessel.

15. Denies every allegation contained in paragraph SIXTEENTH of the complaint, except admits that the NMU wrote a letter dated January 11, 1971 addressed to Commerce and refers to that letter for proof of the contents and meaning thereof.

16. Denies every allegation contained in paragraph SEVENTEENTH of the complaint and affirmatively alleges that Milton Pilalas was not authorized to act on behalf of Commerce in connection with the contract of sale with plaintiff and that plaintiff and defendant NMU had actual knowledge that Pilalas was not authorized to modify, amend or in any way renegotiate the contract of sale. Commerce respectfully refers to the aforesaid letter of January 13, 1971 for proof of the contents and meaning thereof.

17. Denies every allegation contained in paragraph EIGHTEENTH of the complaint, except admits that Commerce sent a telegram to Vantage on February 5, 1971 and respectfully refers to that telegram for proof of the contents and meaning thereof.

18. Denies every allegation contained in paragraph NINETEENTH of the complaint insofar as they relate or refer to Commerce, except admits the allegations contained therein insofar as they relate and refer to the NMU, and affirmatively alleges that the NMU's insistence that any sale or transfer of the Vessel "Barbara" to Vantage or to any other

purchaser only on the condition that the purchaser agree to utilize NMU member employees has been vigorously opposed by Commerce at each and every opportunity and at all times material and relevant hereto.

19. Denies having knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph TWENTIETH of the complaint.

20. For its answer to the allegations contained in paragraph TWENTY-FIRST of the complaint, repeats and realleges the allegations contained in paragraphs 18 and 19 of this answer.

21. Denies every allegation contained in paragraph TWENTY-SECOND of the complaint, except admits that the undertaking contained in the NMU collective bargaining agreement alleged to be in violation of Section 8(e) of the National Labor Relations Act ("NLRA") and in restraint of trade was not contained in the written contract of sale between Commerce and Vantage.

22. Denies every allegation contained in paragraphs TWENTY-THIRD and TWENTY-FOURTH of the complaint, except admits that the NLRB issued a decision and order on May 16, 1972 and respectfully refers to said decision for proof of the contents and meaning thereof and affirmatively alleges that at all times since February 4, 1971 Commerce has sought to prevent the defendant NMU from maintaining, enforcing or giving effect to Article I, Section 2, of the NMU collective bargaining agreement.

23. Denies every allegation contained in paragraph TWENTY-FIFTH of the complaint, except admits that defendant NMU obtained an arbitral award of injunction from the

industry-wide arbitrator appointed under the NMU collective bargaining agreement and refers such award for proof of the contents and meaning thereof.

24. Denies every allegation contained in paragraph TWENTY-SIXTH of the complaint insofar as they relate or refer to Commerce and affirmatively alleges that Commerce opposed the confirmation of such arbitral award.

25. Denies every allegation contained in paragraph TWENTY-SEVENTH of the complaint and respectfully refers to the record of the proceedings in 71 Civil 1460 in this Court and in the United States Court of Appeals for the Second Circuit for the full history of that proceeding.

26. Denies every allegation contained in paragraph TWENTY-EIGHTH of the complaint, except admits that a temporary restraining order and subsequent preliminary injunction obtained by the NMU prohibited the transfer of title to the "Barbara" to Vantage except in compliance with the terms thereof.

27. Denies every allegation contained in paragraph TWENTY-NINTH of the complaint, except admits that on or about February 10, 1971 Commerce instituted arbitration proceedings against Vantage.

28. Denies every allegation contained in paragraph THIRTIETH of the complaint, except admits that Commerce instituted arbitration proceedings against Vantage pursuant to an arbitration clause contained in the Commerce-Vantage contract of sale, dated December 23, 1970, and affirmatively alleges that Vantage moved to stay arbitration only for purposes of delay and that Vantage voluntarily served a demand for arbitration against Commerce

claiming the loss of profits on a charter of the "Barbara".

29. Denies every allegation contained in paragraph THIRTY-FIRST of the complaint, except admits that Commerce obtained an arbitral award against Vantage and respectfully refers the Court to that award, a copy of which is annexed hereto as Exhibit "1" for proof of the contents and meaning thereof.

30. Admits the allegations contained in paragraph THIRTY-SECOND of the complaint.

31. Upon information and belief admits the allegations contained in paragraphs THIRTY-THIRD and THIRTY-FOURTH of the complaint.

32. Denies every allegation contained in paragraph THIRTY-FIFTH of the complaint, except admits that Commerce is seeking and will seek to enter and enforce a judgment to be duly entered in its favor against Vantage.

33. Denies having knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph THIRTY-SIXTH of the complaint.

34. Denies every allegation contained in paragraph THIRTY-SEVENTH of the complaint insofar as they relate or refer to Commerce.

35. Denies every allegation contained in paragraphs THIRTY-EIGHTH and THIRTY-NINTH of the complaint.

ANSWER TO SECOND
CAUSE OF ACTION

36. For its answer to the allegations contained in paragraph FORTIETH of the complaint, repeats and realleges the allegations contained in this answer in re-

sponse to paragraphs FIRST through THIRTY-NINTH (except paragraphs ELEVENTH, THIRTEENTH, EIGHTEENTH, TWENTY-NINTH, THIRTIETH, THIRTY-FIRST, THIRTY-FIFTH, THIRTY-SIXTH, THIRTY-SEVENTH and THIRTY-EIGHTH) of the complaint.

37. Denies every allegation contained in paragraphs FORTY-FIRST and FORTY-SECOND of the complaint insofar as they relate or refer to Commerce, except admits that Commerce and the NMU entered into a three-year collective bargaining agreement for the period June 16, 1969 to June 15, 1972 and refers thereto for proof of the contents and meaning thereof.

38. Denies every allegation contained in paragraphs FORTY-THIRD and FORTY-FOURTH of the complaint, except admits that an award has been duly rendered to Commerce against Vantage and that Commerce is seeking and will seek to enter and enforce a judgment to be duly entered in its favor against Vantage.

39. Denies having knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph FORTY-FIFTH of the complaint.

40. Upon information and belief admits the allegations contained in paragraph FORTY-SIXTH of the complaint insofar as they relate or refer exclusively to officers and employees of defendant NMU and members of the Tankers Service Committee.

41. Denies every allegation contained in paragraph FORTY-SEVENTH of the complaint.

ANSWER TO THIRD CAUSE OF ACTION

42. For its answer to the allegations contained

in paragraph FORTY-EIGHTH of the complaint, repeats and realleges the allegations contained in this answer in response to paragraphs SECOND through TENTH, FOURTEENTH and SIXTEENTH through THIRTY-SEVENTH of the complaint.

43. Denies every allegation contained in paragraph FORTY-NINTH of the complaint.

44. Admits the allegations contained in paragraphs FIFTIETH and FIFTY-FIRST of the complaint.

45. Denies every allegation contained in paragraphs FIFTY-SECOND through FIFTY-FOURTH of the complaint, except admits that defendant NMU had actual knowledge of the contract of sale between plaintiff and defendant Commerce and further admits that defendant NMU obtained an arbitral award of injunction enjoining and restraining Commerce from selling and transferring the Vessel "Barbara" to Vantage unless Vantage provided an undertaking in the form required by Article I, Section 2, of the NMU industry-wide collective bargaining agreement and that the NMU did thereafter obtain a preliminary injunction enforcing said arbitration award against Commerce and Vantage.

46. Denies every allegation contained in paragraph FIFTY-FIFTH of the complaint, except admits that an award has been duly rendered to Commerce against Vantage and that Commerce is seeking and will seek to enter and enforce a judgment to be duly entered in its favor against Vantage.

ANSWER TO FOURTH CAUSE
OF ACTION

47. Denies every allegation contained in paragraph FIFTY-SIXTH of the complaint.

48. For its answer to the allegations contained in paragraph FIFTY-SEVENTH of the complaint, repeats and realleges the allegations contained in this answer in response to paragraphs SECOND through THIRTY-NINTH and FIFTIETH through FIFTY-FIFTH of the complaint.

49. With respect to the allegations contained in paragraphs FIFTY-EIGHTH through SIXTY-FIFTH of the complaint, Commerce respectfully refers the Court to the provisions of the NIRA for the full contents and meaning thereof and to the decision and order of the NLRB, dated May 16, 1972 for the full contents and meaning thereof.

50. Denies every allegation contained in paragraph SIXTY-SIXTH of the complaint insofar as they relate or refer to Commerce.

51. Denies every allegation contained in paragraph SIXTY-SEVENTH of the complaint insofar as they relate or refer to Commerce, except admits that an award has been duly rendered to Commerce against Vantage and that Commerce is seeking and will seek to enter and enforce a judgment to be duly entered in its favor against Vantage.

ANSWER TO FIFTH CAUSE OF ACTION

52. Denies every allegation contained in paragraph SIXTY-EIGHTH of the complaint [plaintiff having omitted paragraph SIXTY-NINTH of the complaint].

53. For its answer to the allegations contained in paragraph SEVENTIETH of the complaint, repeats and realleges the allegations contained in this answer in response to paragraphs SECOND through THIRTY-NINTH of the complaint.

54. With respect to the allegations contained in paragraph SEVENTY-FIRST of the complaint, Commerce respectfully refers the Court to the provisions of the New York General Business Law for the full contents and meaning thereof.

55. Denies every allegation contained in paragraphs SEVENTY-SECOND and SEVENTY-THIRD of the complaint insofar as they relate or refer to Commerce, except admits that an award has been duly rendered to Commerce against Vantage and that Commerce is seeking and will seek to enter and enforce a judgment to be duly entered in its favor against Vantage.

FIRST DEFENSE

56. The complaint fails to state a claim against Commerce upon which relief can be granted.

SECOND DEFENSE

57. On or about February 10, 1971 Commerce commenced an arbitration proceeding against plaintiff, and on or about March 31, 1971 plaintiff commenced an arbitration proceeding against Commerce, both actions utilizing the arbitration clause contained in the Commerce-Vantage contract of sale for the Vessel "Barbara".

58. In such arbitration, Vantage specifically submitted its claim for alleged lost profits on a proposed long-term charter of the "Barbara", which is the same claim set forth in the complaint herein to the arbitrators, who expressly and specifically disallowed the claim of Vantage against Commerce and who further ordered Vantage to pay to Commerce the sum of $2,883,264.10 minus the proceeds from sale of the Vessel.

59. Said arbitration and award constitutes a valid and enforceable adjudication of the respective rights and liabilities of Commerce and Vantage pursuant to the contract of sale. The award is a final and binding decision enforceable in the courts and not open to review on the merits.

60. On November 20, 1972, the arbitration award described herein in paragraphs 57, 58 and 59 of this Answer was confirmed by the Supreme Court of the State of

New York in a 26-page decision over Vantage's opposition on the ground, inter alia, that the arbitrators had improperly passed upon questions of antitrust law. A copy of that opinion is annexed hereto as Exhibit "2".

61. By reason thereof, plaintiff's claims against Commerce for damages arising out of the non-consummation of the Contract of Sale set forth in the complaint in this action have been previously adjudicated and determined and plaintiff is barred under the principles of res judicata and collateral estoppel from relitigating its claim against Commerce.

THIRD DEFENSE

62. In its opinion confirming the arbitral award (Exhibit "2" hereto) including the arbitrators' express rejection of Vantage's claim for lost profits on the proposed long-term charter of the "Barbara", the Supreme Court of the State of New York stated that the issues before the arbitrators "included the broad issue of whether Vantage failed to live up to its agreement to 'take care of' the union problem or else bear the loss". As stated by Vantage itself, the "questions to be determined" by the arbitration panel were "who failed to perform; who assumed the risk; who should bear the loss".

63. In confirming the arbitrators' rejection of Vantage's claim and the sustaining of Commerce's claim, the Court cited the ample evidence adduced during the eleven days of arbitration hearings, upon which the arbitrators based their determination that Vantage itself

was responsible for losses incurred, including its loss of the Socal charter.

64. Among such acts of Vantage referred to by the Court were: Vantage's refusal to participate in negotiations with the NMU to settle the dispute; Vantage's refusal to rescind the contract when the labor problems appeared insurmountable; and Vantage's refusal to cooperate with Commerce in finding a commercially feasible way of avoiding loss to any party, such as by assigning the charter to Commerce, with the profits being remitted to Vantage, until union problems were settled.

65. By reason of the foregoing, the issues of Vantage's failure to mitigate damages, Vantage's voluntary assumption of the risk and the causation of Vantage's losses have all been previously adjudicated and determined adversely to Vantage.

66. Vantage's wounds have been found to be self-inflicted and Vantage is precluded by application of the principles of res judicata and collateral estoppel from relitigating those questions and the claims based thereon against Commerce.

FOURTH DEFENSE

67. On or about February 22, 1972, in an action in the United States District Court for the Southern District of New York entitled National Maritime Union v. Commerce Tankers Corporation and Vantage Steamship Corp.

(71 Civ. 1460), plaintiff herein was granted leave to intervene as a defendant in a proceeding commenced by the NMU against Commerce to confirm an arbitration award rendered by Theodore W. Kheel, the industry-wide arbitrator, restraining the sale of the "Barbara" by Commerce to Vantage or any other purchaser unless the purchaser complied with Article I, Section 2 of the NMU collective bargaining agreement.

68. In the answer filed by plaintiff herein in said proceeding, Vantage asserted a counterclaim against the NMU (but no claim against Commerce), alleging that the provisions of Article I, Section 2 of the NMU Collective Bargaining Agreement entered into between the NMU and Commerce was in violation of the antitrust laws.

69. In such action, Vantage sought recovery under the antitrust laws of three times its damages which it alleged consisted of the loss of anticipated earnings from the proposed long-term charter of the "Barbara" to Standard Oil Company of California.

70. Said counterclaim by Vantage is based on the same claim as that set forth by Vantage in the complaint herein. The parties to the aforesaid action are the same as the parties to this action and such action is now pending and undisposed of.

71. By reason of the foregoing, Vantage is precluded from asserting claims in this action.

FIFTH DEFENSE

72. Reasserts and realleges each and every allegation set forth in paragraphs 67 through 71 of this answer.

73. In its answer as intervener in the action entitled NMU v. Commerce Tankers Corporation and Vantage Steamship Corp., 71 Civ. 1460, Vantage alleged that "on information and belief, [the NMU] imposed its will on [Commerce] and through economic pressure forced [Commerce] to agree to the terms of Article I, Section 2 of the Agreement" and that the NMU "has restrained [Commerce] from selling the Vessel "Barbara" to [Vantage]".

74. By reason of the foregoing, Vantage is precluded from asserting these claims in this action against Commerce and from alleging herein that Commerce has engaged in any conspiracy in violation of the antitrust laws.

SIXTH DEFENSE

75. Repeats and realleges each and every allegation set forth in paragraphs 67 through 71, 73 and 74 of this answer.

76. The very same claims which are asserted in the complaint herein against the NMU, Commerce and Vernitron were asserted by Vantage against the NMU only in NMU v. Commerce Tankers Corporation and Vantage Steamship Corp., 71 Civ. 1460, notwithstanding that Commerce was also a party to that action.

77. Plaintiff has also asserted in another action in this Court that the same conduct which is complained of in the instant action was in violation of the antitrust laws. This was so asserted in Vantage Steamship Corp. v. Commerce Tankers Corporation, 71 Civ. 4381, an action commenced by Vantage in this Court to vacate the arbitral

award described in paragraphs 57, 58 and 59 of this Answer, which award adjudicated plaintiff's claim against Commerce for lost profits and Commerce's claim against Vantage for breach of contract.

78. In its petition in that action, Vantage asserted that the arbitrators had exceeded their jurisdiction by passing upon questions of antitrust law. This proceeding, although not diligently prosecuted by Vantage, is still pending.

79. Moreover, it has also asserted in still another action that the same conduct complained of in the instant action was in violation of the antitrust laws. This was so asserted in Vantage Steamship Corp. v. Commerce Tankers Corporation, the New York Supreme Court action described in paragraphs 60 and 61 of this Answer.

80. By reason of the foregoing, plaintiff has split one cause of action and has created multiple trials involving the very same alleged breach of duty.

81. By reason of the foregoing, plaintiff is precluded from asserting these claims in this action.

SEVENTH DEFENSE

82. Repeats and realleges each and every allegation contained in paragraphs 67 through 71, 73, 74 and 76 through 81 of this Answer.

83. By reason of the foregoing plaintiff is bound by its own election of remedies.

84. By reason of the foregoing plaintiff is precluded from asserting these claims in this action.

EIGHTH DEFENSE

85. Plaintiff's fourth cause of action against Commerce and Vernitron, neither of which is a labor organization within the meaning of the NLRB, does not lie under Section 303 of the Labor Management Relations Act of 1947, which precludes the bringing of a private right of action against an entity other than a labor organization.

NINTH DEFENSE

86. To prevail on a private right of action brought under the antitrust laws, a plaintiff must prove that the damages incurred by it were proximately caused by the violation of the antitrust laws alleged.

87. Even if Vantage were to sustain its claim that a violation of the antitrust laws had occurred, its alleged damages were not the proximate result of a violation of the antitrust laws because they were caused not by any alleged conspiracy or by any act of Commerce but by the independent and voluntary actions of plaintiff.

88. By reason of the foregoing, plaintiff is precluded from recovery against Commerce in this action.

TENTH DEFENSE

89. Neither Commerce nor Vernitron is or was a member of the Tankers Service Committee and neither Commerce

nor Vernitron attended any of the negotiations between the Tankers Service Committee and the NMU relating to the NMU Collective Bargaining Agreement.

90. The NMU insisted on uniformity in its collective bargaining agreements with tanker companies and all tanker companies in the industry whose unlicensed seamen were represented by the NMU adopted this agreement without variation.

91. Commerce owned and operated only two vessels, could have no impact in negotiating terms with the NMU and was in no position to bargain for terms at variance with those adopted by the Tankers Service Committee.

92. Commerce thus had no genuine choice about entering into the Collective Bargaining Agreement with the NMU and was as an economic and practical matter coerced into entering into the Collective Bargaining Agreement in the form presented by the NMU.

93. Moreover, Commerce has also vigorously opposed enforcement of Article I, Section 2 of the Agreement, which restrained Commerce against its will from the free alienation of its vessels and has consistently taken steps at great expense to itself to avoid and prevent enforcement of that provision.

94. By reason of the foregoing, Commerce having strenuously opposed enforcement of the NMU Successorship clause, plaintiff may not recover in this action against Commerce.

ELEVENTH DEFENSE

95. If defendants are indebted to plaintiff for damages resulting from a conspiracy in violation of the antitrust laws, then defendants are indebted to plaintiff jointly with Tankers Service Committee, which plaintiff has alleged, in paragraphs ELEVENTH and TWELFTH of the complaint to be part of the conspiracy alleged.

96. Upon information and belief, the Tankers Service Committee, an unincorporated association which can be made a party to this action without depriving this Court of jurisdiction of the present parties, has not been made a party and should be made a party if complete relief is to be accorded among these parties already joined.

97. By reason of the foregoing, plaintiff is precluded from recovering in this action against Commerce.

TWELFTH DEFENSE

98. Plaintiff has at all times failed and refused to attempt to mitigate damages, if any, arising from the non-consummation of the contract to purchase the "Barbara". Moreover, plaintiff has repeatedly sought to impede Commerce's efforts to mitigate and reduce the damages incurred by all parties to the transaction.

99. By reason of the foregoing, plaintiff may not recover in this action against Commerce.

CROSS-CLAIM AGAINST DEFENDANT
NATIONAL MARITIME UNION

100. Should defendant Commerce be held liable for any or all of the claims set forth by plaintiff in the complaint, such liability will have been brought about and caused solely by the actions of the NMU and not by reason of any conspiracy or act on the part of Commerce and therefore, the NMU is liable to indemnify Commerce for all of such liability.

WHEREFORE, defendant Commerce Tankers Corporation demands judgment:

1. Dismissing the complaint;

2. Awarding to Commerce and Vernitron judgment against the NMU for any sum which may be recovered herein by the plaintiff against Commerce and/or Vernitron; and

3. Awarding to Commerce against plaintiff the costs and disbursements of this action, together with reasonable attorneys' fees and such other and further relief as the Court may deem just and proper.

Dated: New York, New York
November 22, 1972

MARSHALL, BRATTER, GREENE,
ALLISON & TUCKER

By _____
A Member of the Firm
Attorneys for Commerce Tankers
Corporation and Vernitron
Corporation
Office and P. O. Address
430 Park Avenue
New York, New York 10022

ANSWER OF DEFENDANT VERNITRON CORP. (72 CIV. 4619)
(Filed November 27, 1972)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- X

VANTAGE STEAMSHIP CORPORATION, :

Plaintiff, :

- against - :

NATIONAL MARITIME UNION OF AMERICA, AFL-CIO, COMMERCE TANKERS CORPORATION and VERNITRON CORPORATION, :

Defendants. :

- X

72 Civ. 4619

A N S W E R

Vernitron Corporation, by its attorneys, Marshall, Bratter, Greene, Allison & Tucker, for its answer to the complaint herein states as follows:

1. Denies every allegation contained in paragraph FIRST of the complaint.

2. Upon information and belief admits the allegations contained in paragraph SECOND of the complaint.

3. Denies having knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph THIRD of the complaint.

4. Upon information and belief admits the allegations contained in paragraph FOURTH of the complaint.

5. Admits the allegations contained in paragraph FIFTH of the complaint.

6. Admits the allegations contained in paragraph SIXTH of the complaint.

7. Denies every allegation contained in paragraph SEVENTH of the complaint.

8. Admits the allegations contained in paragraph EIGHTH of the complaint.

9. Denies having knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph NINTH of the complaint.

10. Denies having knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph TENTH of the complaint.

11. Denies every allegation contained in paragraphs ELEVENTH through SEVENTY-THIRD of the complaint, inclusive, insofar as said allegations relate or refer or could be construed to relate or refer to it, and affirmatively alleges that it is not now nor has it ever been engaged in trade and commerce in the sale and transfer of American flag cargo ships and in the transportation of goods and commodities by American flag cargo ships in interstate and foreign commerce, within the meaning of the Sherman Act, and further alleges that it is not now nor has it ever been a party to any contract whatsoever with the plaintiff or to any contract, combination, conspiracy or understanding whatsoever with the defendant National Maritime Union of America, AFL-CIO, and

moreover affirmatively alleges that its failure to respond to those allegations which do not and could not relate or refer to it should not be construed to be an admission of the truth of those other allegations.

FIRST DEFENSE

12. The complaint fails to state a claim against Vernitron Corporation ("Vernitron")upon which relief can be granted.

SECOND DEFENSE

13. Insofar as any potential liability of Vernitron would be derivative in nature, i.e., not as a result of any independent act of Vernitron (and indeed none has been alleged), but as a consequence of the ownership by Vernitron of all of the outstanding stock of Commerce Tankers Corporation ("Commerce") Vernitron adopts and alleges as if set forth in full the affirmative defenses set forth in the answer of Commerce served simultaneously herewith on November 22, 1972, a copy of which is annexed hereto as Exhibit "1" and made a part hereof.

WHEREFORE, Vernitron Corporation demands judgment dismissing the complaint together with the costs and disbursements, including reasonable attorneys' fees incurred in the defense of this action and such other and further relief as the Court may deem just and proper.

Dated: New York, New York
November 22, 1972

MARSHALL, BRATTER, GREENE,
ALLISON & TUCKER

By _____
A Member of the Firm
Attorneys for Vernitron
Corporation
Office and P. O. Address
430 Park Avenue
New York, New York 10022

ANSWER OF DEFENDANT NMU (72 CIV. 4619)
(Filed November 29, 1972)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

VANTAGE STEAMSHIP CORPORATION, :

Plaintiff, :

vs. :

NATIONAL MARITIME UNION OF AMERICA, AFL-CIO, COMMERCE TANKERS CORPORATION AND VERNITRON CORPORATION, :

Defendant. :

----------x

ANSWER OF DEFENDANT NATIONAL MARITIME UNION OF AMERICA, AFL-CIO

72 Civ. 4619 (TPG)

Defendant, National Maritime Union of America, AFL-CIO, by its attorney, answering the complaint, alleges as follows:

As to the First Cause of Action

1. Admits the allegations contained in paragraphs 4, 8, 10, 14 and 16 of the complaint.

2. Denies each and every allegation contained in paragraphs 11 and 21 of the complaint.

3. Denies knowledge or information sufficient to form a belief as to the allegations contained in pargraphs 2, 3, 6, 7, 18, 22, 29, 30, 31, 32, 35 and 36 of the complaint and therefore denies same and demands proof thereof if relevant.

4. Admits the existence of the statutory provision referred to in paragraph 1 of the complaint. Denies that plaintif has no adequate remedy at law as alleged in paragraph 1 of the complaint, and denies knowledge or information sufficient to form a belief as to the remaining allegations contained in paragraph 1 of the complaint and therefore denies same and demands proof

thereof, if relevant.

5. It is admitted that defendant, Commerce Tankers Corporation has owned and operated American flag tankers, but no freight ships, in interstate and foreign commerce. Except as specifically admitted herein, answering defendant denies knowled or information sufficient to form a belief as to the remaining allegations of paragraph 5 of the complaint and therefore denies same and demands proof thereof if relevant.

6. It is admitted that Tanker Service Committee acts as the collective bargaining representative for its members in dealing with certain unions, including defendant National Maritim Union of America, AFL-CIO. Except as specifically admitted herein, answering defendant denies knowledge or information sufficient to form a belief as to the remaining allegations of paragraph 9 of the complaint and therefore denies same and demands proof thereof if relevant.

7. It is admitted that Tanker Service Committee and NMU negotiated a collective bargaining agreement covering the unlicensed seaman employed by the member companies of the Tanker Service Committee which covered the period from June 1969 to June 1972. It is denied that said agreement is applicable to all NMU contract vessels and companies as alleged in paragraph 12 of the complaint.

8. It is admitted that in July of 1969, NMU and Commerce entered into a three-year collective bargaining agreement covering the period from June 16, 1969 to June 15, 1972, which was identical to the contract entered into between NMU and Tanker Service Committee and which contained the provisions set forth in

exhibit A to the complaint. Said contract provisions speak for themselves. It is specifically denied that NMU and Commerce acted in furtherance of any illegal contract, combination or conspiracy as alleged in paragraph 13 of the complaint.

11. It is admitted that there was a collective bargaining agreement in existence between Vantage and the Seafarers International Union. The terms of such agreement speak for themselves. Except as specifically admitted herein, answering defendant denies each and every allegation contained in paragraph of the complaint.

12. Admits the existence of the letter dated January 13, 197 identified as exhibit C to the complaint. Said letter speaks itself. Except as specifically admitted herein, answering defendant denies each and every allegation contained in paragraph 7 of the complaint.

Answering defendant denies that there was any illegal contract, combination, or conspiracy as alleged in paragraph of the complaint, but admits that through appropriate judicial proceedings, it has sought judicial enforcement of the contractual provisions contained in the collective bargaining agreement with Commerce. Except as specifically admitted herein, answering defendant denies each and every allegation contained in paragraph 19 of the complaint.

12. Denies each and every allegation of paragraph 20 of the complaint as stated. The provisions of the National Labor Relations Act speak for themselves and the interpretation of said statutory provisions are a question of law to be determined by the

Court. It is expressly denied that Vantage could not own any ship manned by NMU members or that the National Labor Relations Act required Vantage to abide by the collective bargaining agreement between it and the SIU as alleged in paragraph 20 of the complaint.

13. Answering defendant denies the allegations of paragraph 23 of the complaint as stated. The decision of the National Labor Relations Board identified as exhibit D speaks for itself.

14. Answering defendant denies the allegations of paragraph 24 of the complaint as stated. The order of the National Labor Relations Board speaks for itself. Answering defendant specifically alleges that the contract provisions in question were valid work preservation clauses under Section 8(e) of the National Labor Relations Act.

15. It is admitted that defendant NMU sought arbitration pursuant to its collective bargaining agreement with Commerce under which Theodore W. Kheel, Esq. was designated the arbitrator. It is admitted that arbitrator Kheel issued an order requiring Commerce to abide by the provisions of Article 1, Section 2 of its collective bargaining agreement with National Maritime Union. It is expressly denied that there was any illegal contract, combination, or conspiracy as alleged in paragraph 25 of the complaint.

16. It is admitted that defendant NMU moved in the United States District Court for the Southern District of New York to confirm the award of arbitrator Kheel. It is expressly

denied that there was any illegal contract, combination, or conspiracy by NMU as alleged in paragraph 26 of the complaint, and except as specifically admitted herein, answering defendant denies each and every allegation contained in paragraph 26 of the complaint.

17. The allegations of paragraph 27 of the complaint are denied as stated. The terms of the temporary restraining order referred to therein speak for themselves.

18. It is denied that the temporary restraining order referred to in paragraph 28 of the complaint prohibited the transfer of the S.S. Barbara to Vantage under all circumstances. Answering defendant denies knowledge or information with respect to the remaining allegations of paragraph 28 of the complaint and therefore denies same and demands proof thereof if relevant.

19. It is denied that the American flag fleet is divided into two major segments has referred to in paragraph 33 of the complaint, but it is admitted that there are numerous companies that have collective bargaining agreements with NMU and numerous companies which have collective bargaining agreements with SIU, and that there are some companies that have contracts with independent unions. Except as specifically admitted herein, answering defendant denies each and every allegation contained in paragraph 33 of the complaint.

20. It is denied that the sale of vessels in the maritime industry is a "common occurrence". Answering defendant denies knowledge or information sufficient to form a belief as to the remaining allegations of paragraph 34 of the complaint and

therefore denies same and demands thereof if relevant.

21. Denies each and every allegation contained in paragraph 37 of the complaint except as to the allegation with respect to the amount which Vantage claims to have expended in participating in the arbitration and legal proceedings referred to in the complaint, and with respect to such allegations denies knowledge and information sufficient to form a belief and therefore denies same and demands proof thereof if relevant.

22. Answering defendant denies that there has been any illegal agreement, combination or conspiracy, and further denies that defendant lacks an adequate remedy at law or that an injunction is either necessary or proper. Answering defendant denies knowledge or information with respect to any of the remaining allegations of paragraph 38 of the complaint and therefore denies same and demands proof thereof if relevant.

23. It is denied that the denial of the relief sought in the complaint will inflict greater injury upon the plaintiff that would be inflicted upon the defendants if granted. Answering defendant denies knowledge or information sufficient to form a belief with respect to the remaining allegations of paragraph 39 of the complaint and therefore denies same and demands proof thereof if relevant.

As to the Second Cause of Action

24. Answering defendant repeats and realleges its answers to the allegations of paragraphs 1 through 34 of the complaint (except paragraphs 11, 13, 18, 29, 30, 31, 35, 36, 37 and 38) set forth above with the same force and effect as if set forth herein at length.

25. Denies each and every allegation contained in paragraphs 41, 46 and 47 of the complaint.

26. Denies that there has been any illegal contract, combination or conspiracy as alleged in paragraphs 43 and 44 of the complaint, and denies knowledge or information sufficient to form a belief as to the remaining allegations of paragraphs 43 and 44 of the complaint and of all the allegations of paragraph 45 of the complaint and therefore denies same and demands proof thereof if relevant.

27. Admits that NMU and Commerce entered into a collective bargaining agreement covering the period from June 16, 1969 to June 15, 1972 which contained the provision set forth in exhibit A to the complaint. Said contract provisions speak for themselves. Except as specifically admitted herein, denies each and every allegation contained in paragraph 42 of the complaint.

As to the Third Cause of Action

28. Answering defendant repeats and realleges its answers to the allegations of paragraphs 2 through 10, 14 and 16 through 37 of the complaint set forth above with the same force and effect as if set forth herein at length.

29. Denies each and every allegation of paragraphs 51 and 52 of the complaint.

30. Denies knowledge or information sufficient to form a belief as to the allegations of paragraphs 49 and 50 of the complaint and therefore denies same and demands proof thereof

31. Admits the institution of arbitration proceedings against Commerce, but except as specifically admitted herein, denies each and every allegation of paragraph 53 of the complaint.

32. Denies each and every allegation of paragraph 54 of the complaint except that it admits the arbitration award restrained any transfer of the S.S. Barbara without compliance with Article I, Section 2 of the collective bargaining agreement.

33. Denies the commission of any illegal acts by NMU and denies knowledge or information sufficient to form a belief as to the remaining allegations of paragraph 55 of the complaint and therefore denies same and demands proof thereof if relevant.

As to the Fourth Cause of Action

34. Answering defendant repeats and realleges its answers to the allegations of paragraphs 2 through 39, and 50 through 55 of the complaint, with the same force and effect as if set forth herein at length.

35. Denies each and every allegation contained in paragraphs 61, 64 and 66 of the complaint.

36. Denies knowledge or information sufficient to form a belief as to the allegations of paragraphs 56, 63 and 67 of the complaint and therefore denies same and demands proof thereof if relevant.

37. Denies the allegations of paragraphs 58, 59, 60, 62 and 65 of the complaint as stated. The statutory provisions and order referred to therein speak for themselves.

As to the Fifth Cause of Action

38. Answering defendant repeats and realleges its answers to the allegations of paragraphs 2 through 39 of the complaint with the same force and effect as if set forth herein at length.

39. Denies knowledge or information sufficient to form a belief as to the allegations of paragraphs 68 and 73 of the complaint and therefore denies same and demands proof thereof if relevant.

40. Denies the allegations of paragraph 71 of the complaint as stated. The statutory provision referred to therein speaks for itself.

41. Denies each and every allegation contained in paragraph 72 of the complaint.

First Affirmative Defense

42. As to each and all causes of action, the complaint fails to state a claim upon which relief can be granted.

Second Affirmative Defense

43. As to each and all causes of action, the Court lacks jurisdiction over the person of defendant National Maritime Union, AFL-CIO.

Third Affirmative Defense

44. As to each and all causes of action, the Court lacks jurisdiction over the subject matter of the action.

Fourth Affirmative Defense

45. As to each and all causes of action alleged in the complaint, the matters which are the subject of the complaint and each separate cause of action thereof, lie within the exclusive

original jurisdiction of the National Labor Relations Board and may not be the subject of a civil action in the District Court.

Fifth Affirmative Defense

46. As to the first, second and third causes of actio defendant National Maritime Union of America is not subject to liability under the Anti-Trust laws by virtue of the provisions Section 6 of the Clayton Act, 15 U.S.C., Section 17. In additio no action for an injunction lies against defendant National Maritime Union of America, AFL-CIO arising out of the matters alleged in the complaint, by virtue of the provisions of Section 20 of the Clayton Act, 29 U.S.C. Section 52, and Section 1 of the Norris-LaGuardia Act, 29 U.S.C. Section 101.

Sixth Affirmative Defense

47. As to the fourth cause of action, Section 303 of the National Labor Relations Act, 29 U.S.C. Section 187 does not provide a remedy for an alleged violation of Section 8(e) of the National Labor Relations Act.

Seventh Affirmative Defense

48. As to the fourth cause of action, the matters alleged in the complaint do not fall within the prohibition contained in Sections 8(b)(4)(ii)(A) or (B) of the National Labor Relations Act.

WHEREFORE, defendant National Maritime Union prays

that the complaint be dismissed and that it recovers its costs and expenses in defending action.

Dated: New York, New York
November 21, 1972

ABRAHAM E. FREEDMAN

by _____
Attorney for Defendant,
National Maritime Union of America, AFL-CIO
36 Seventh Avenue
New York, New York 10011
929-8410

TO: Surrey, Karasik, Morse & Sehan
500 Fifth Avenue
New York, New York 10036
Attorneys for Plaintiff,
Vantage Steamship Corporation

Marshall, Bratter, Greene, Allison & Tucker
430 Park Avenue
New York, New York 10022
Attorneys for Defendants,
Commerce Tankers Corporation and
Vernitron Corporation

BEST COPY AVAILABLE

STIPULATION DISMISSING ACTION AGAINST DEFENDANTS COMMERCE & VERNITRON (72 CIV. 4619) (Filed June 22, 1973) 262a

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

VANTAGE STEAMSHIP CORPORATION,

Plaintiff,

-against-

NATIONAL MARITIME UNION OF AMERICA AFL-CIO, COMMERCE TANKERS CORPORATION and VERNITRON CORPORATION,

Defendants.

72 Civ. 4619

STIPULATION OF DISMISSAL OF ACTION AS AGAINST DEFENDANTS COMMERCE TANKERS CORPORATION AND VERNITRON CORPORATION ONLY

IT IS HEREBY STIPULATED AND AGREED, by and between the undersigned, attorneys for plaintiff and for defendants COMMERCE TANKERS CORPORATION and VERNITRON CORPORATION, that the above-entitled action be and hereby is dismissed, with prejudice and without costs, as against defendants COMMERCE TANKERS CORPORATION and VERNITRON CORPORATION only.

Nothing herein contained shall be deemed a dismissal or release of any claim or cause of action which plaintiff may have against defendant NATIONAL MARITIME UNION OF AMERICA AFL-CIO.

Dated: New York, New York
1973

SURREY, KARASIK, MORSE AND SEHAM

By _____
A Member of the Firm,
Attorneys for Plaintiff
Office and P. O. Address
500 Fifth Avenue
New York, New York 10036
(212) 239-7200

MARSHALL, BRATTER, GREENE, ALLISON & TUCKER

By _____
A Member of the Firm,
Attorneys for Defendants Commerce Tankers Corporation and Vernitron Corporation
Office and P. O. Address
430 Park Avenue
New York, N. Y. 10022
(212) 421-7200

SO ORDERED:

S/ T. P. Griesa J
U. S. D. J.

day of , 19 .

(Filed July 6, 1974)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

NATIONAL MARITIME UNION OF AMERICA, AFL-CIO,

Plaintiff,

-against-

COMMERCE TANKERS CORPORATION,

Defendant,

and

VANTAGE STEAMSHIP CORPORATION,

Intervening Defendant.

71 Civ. 582

AMENDED COUNTERCLAIMS

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Commerce Tankers Corporation, by its attorney, D. David Cohen, for its amended counterclaims herein alleges as follows:

AS AND FOR ITS FIRST
AMENDED COUNTERCLAIM

FIRST: Plaintiff, National Maritime Union of America, AFL-CIO ("NMU") is an unincorporated association having its principal place of business in the Borough of Manhattan, City and State of New York. Plaintiff's principal activity is the representation as collective bargaining agent of the seamen and other unlicensed personnel upon United States flag vessels engaged in interstate commerce including, without limitation, the transoceanic carriage of oil and grain cargoes.

SECOND: Defendant, Commerce Tankers Corporation

("Commerce") is a Delaware corporation having its principal place of business at 175 Community Drive, Great Neck, New York 11021. At all times prior to December 1970, Commerce was the owner and operator of two United States flag vessels engaged in the transoceanic carriage of oil and grain cargoes in interstate commerce.

THIRD: Intervening defendant, Vantage Steamship Corporation ("Vantage"), is a New York corporation having its principal place of business at 11 Broadway, New York, New York. At all times pertinent hereto, Vantage has been the operator of certain United States flag vessels engaged in the transoceanic carriage of oil and grain cargoes.

FOURTH: At all times relevant hereto, the seamen employed upon all United States flag vessels operated by defendant Commerce were represented by the plaintiff NMU.

FIFTH: Upon information and belief, at all times relevant hereto, the seamen employed upon all United States flag vessels operated by intervening defendant Vantage were represented by the Seafarers International Union of North America ("SIU").

SIXTH: Upon information and belief, at all times relevant hereto, certain valuable trading privileges relating to the carriage of cargoes from one United States port to another United States port have been limited, by statute, to United States flag vessels.

SEVENTH: Upon information and belief, at all times

relevant hereto, substantially all parties engaged in, or desiring to enter into, the market for the carriage of oil and grain cargoes by United States flag vessels were obligated, as a practical matter, to retain seamen to be employed upon the vessels operated or to be operated who were represented by either the NMU or the SIU, or affiliates thereof.

EIGHTH: Upon information and belief, the NMU and SIU have a long history of rivalry and bitter competition, including, inter alia, the use of illegal and violent tactics in the attempt by each to acquire and maintain a position of dominance in their trade and industry.

NINTH: In 1962, in an effort to resolve the differences between the NMU and the SIU, the National Labor Relations Board ("Board") determined that as a general rule, upon transfer of any vessel from any one operator engaged in the operation of United States flag vessels to any other operator engaged in said business, the collective bargaining representative for the seamen employed on other vessels of the acquiring operator would become, upon transfer of the vessel, the collective bargaining representative for the seamen subsequently employed upon the newly acquired vessel, and said principle of law in labor relations in the maritime industry became known as the fleetwide representation rule (hereinafter "fleetwide rule" or "fleetwide principle").

TENTH: On or about July 15, 1969, the NMU, in an effort to avoid or evade the impact of the aforesaid fleetwide rule, negotiated for and secured in the industry NMU collective bargaining agreement a provision (Article 1,

Section 2 thereof, hereinafter referred to as the "Restraint-on-Transfer" provision), which in substance obligated any NMU company to obtain for the benefit of the NMU a written undertaking to be executed by any United States flag operator to which any vessel theretofore manned by NMU personnel was to be sold or transferred, that the NMU crew and contract shall be continued subsequent to such sale and transfer.

ELEVENTH: Commerce was not a party to the negotiations which resulted in the 1969 NMU industry-wide contract, including the Restraint-on-Transfer provision, but was nevertheless required by the NMU to adopt and adhere to the terms thereof as a condition to the continued uninterrupted operation by Commerce of its vessels.

TWELFTH: On or about December 23, 1970, Commerce entered into an agreement ("Sales Agreement") to sell the Vessel S.S. BARBARA to Vantage. Pursuant to the Sales Agreement, the purchase price to be received by Commerce from Vantage for the Vessel was fixed at Two Million Seven Hundred and Fifty Thousand ($2,750,000.) Dollars.

THIRTEENTH: The Sales Agreement did not contain an undertaking on the part of the purchaser in accordance with the Restraint-on-Transfer provision of the NMU collective bargaining contract.

FOURTEENTH: In January, 1971, and at all times thereafter, the NMU commenced a course of action which unlawfully and improperly interfered with and prevented the consummation of the sale of the Vessel by Commerce to Vantage pursuant to

the Sales Agreement by insisting that Commerce obtain from Vantage, prior to sale, a written undertaking on the part of Vantage to employ on the Vessel BARBARA, subsequent to the transfer thereof, seamen represented by the NMU.

FIFTEENTH: The plaintiff's insistence that Vantage employ seamen on the Vessel BARBARA represented by the NMU and its acts to enforce such insistence against the will of Commerce and Vantage were undertaken, although plaintiff knew full well that Vantage had a collective bargaining agreement with the SIU which required, in accordance with the fleetwide principle established by the Board, that Vantage employ upon all vessels operated by it only seamen represented by the SIU.

SIXTEENTH: In furtherance of its course of action to interfere with and prevent Commerce from freely disposing of the Vessel BARBARA, the NMU secured in February of 1971, over the objection of Commerce, an arbitral award from an industry-wide arbitrator restraining Commerce from transferring the Vessel to Vantage or any other non-NMU contracted United States flag operator without first obtaining from Vantage or such other purchaser a written undertaking to continue the NMU crew and contract.

SEVENTEENTH: In furtherance of its course of action to interfere with and prevent Commerce from freely disposing of the Vessel BARBARA, the NMU refused to accept and abide by a lawful determination by the District Court for the Southen District of New York, which would have permitted the the transfer of the Vessel by Commerce to Vantage in March of 1971 in accordance with the Sales Agreement, notwithstanding

the fact that Vantage filed an undertaking, in accordance with the order of said Court, to abide by the ultimate determination of the Board as to the proper collective bargaining agent for the seamen to be employed on the Vessel BARBARA.

EIGHTEENTH: In furtherance of its course of action to interfere with and prevent Commerce from freely disposing of the Vessel BARBARA, the NMU obtained, in March of 1971, a temporary restraining order and preliminary injunction enforcing the arbitration award referred to in paragraph SIXTEENTH hereinabove. In obtaining such injunction, the NMU persuaded the Court that Commerce had proceeded in secret in connection with the sale of the Vessel, provided inaccurate and/or misleading information concerning the transaction and had then sought to delay the arbitration until subsequent to the transfer of the Vessel, all of which representations the NMU knew to be untrue or so devoid of factual foundation as to be maliciously false,when considered in the light of other material information in the possession of the NMU and not disclosed to the court.

NINETEENTH: On or about March 29, 1971, Commerce notified the NMU that all of the efforts on behalf of Commerce to obtain a substitute United States flag operator ready, willing and able to purchase the Vessel BARBARA on commercially acceptable terms had been unsuccessful, and Commerce requested that the NMU cease its interference in Commerce's efforts to sell the Vessel BARBARA to Vantage, which the NMU, in furtherance of its illegal and unrightful conduct, refused to do.

TWENTIETH: In or about August of 1971, Commerce notified the NMU of the existence of a possible foreign flag purchaser interested in acquiring the Vessel BARBARA and Commerce requested that the NMU confirm that it would not seek to impose upon such foreign flag purchaser any obligation to retain the NMU crew and contract, and the NMU, in furtherance of its illegal and unrightful conduct, refused to so confirm.

TWENTY-FIRST: On March 22, 1972, the United States Court of Appeals for the Second Circuit determined, pursuant to an appeal by Commerce from the Order of preliminary injunction, that the injunction obtained by the NMU interfering with and preventing Commerce's sale of the Vessel BARBARA to Vantage had been improvidently granted and the Court of Appeals reversed such order.

TWENTY-SECOND: On May 22, 1972, the Vessel BARBARA was sold by Commerce to Plaza Shipping, Inc. for a sales price of $700,000.

TWENTY-THIRD: As a direct result of the unlawful and improper interference by the NMU in the business affairs of Commerce, Commerce has sufiered a loss in connection with the sale of the Vessel BARBARA of $2,050,000.00, plus the costs and expenses of maintaining the Vessel from March 1971 through May 1972, no part of which aggregate sum has been recovered, except for $700,000.00 thereof, which has been paid or promised by Vantage to Commerce by reason of the non-consummation of the Sales Agreement.

AS AND FOR ITS SECOND
AMENDED COUNTERCLAIM

TWENTY-FOURTH: Defendant repeats and realleges each and every allegation contained in paragraphs FIRST through

SEVENTH, TWELFTH through SEVENTEENTH, and TWENTY-FIRST through TWENTY-THIRD, as if set forth in full herein.

TWENTY-FIFTH: The NMU willfully and knowingly undertook the risk of, and legal responsibility for, the losses, damages and expenses incurred by Commerce in connection with the sale of the Vessel BARBARA when it secured an injunction in a labor dispute preventing the sale by Commerce of the Vessel to Vantage with full knowledge and understanding that there was no other purchaser then ready, willing and able to purchase said Vessel on commercially acceptable terms, and in compliance with said injunction.

AS AND FOR ITS THIRD
AMENDED COUNTERCLAIM

TWENTY-SIXTH: This action arises under the National Labor Relations Act ("NLRA"), as amended.

TWENTY-SEVENTH: Defendant repeats and realleges each and every allegation contained in paragraphs FIRST through SEVENTH, NINTH through SEVENTEENTH, TWENTY-FIRST through TWENTY-THIRD and TWENTY-FIFTH hereof, as if set forth in full herein.

TWENTY-EIGHTH: The conduct of the NMU in undertaking to enforce, and enforcing against the will and over the objection of Commerce, the provisions of Article 1, Section 2 of the industry-wide NMU collective bargaining agreement constituted an unfair labor practice by a labor organization within the definition of Section 8 (e) of the NLRA.

TWENTY-NINTH: On or about May 16, 1972, the Board determined that the Restraint-on-Transfer provisions of the NMU collective bargaining agreement were not valid, as in violation of Section 8 (e) of the NLRA, and the Board further ordered the NMU and defendant Commerce to cease and desist from implementation of the Restraint-on-Transfer provision of the industry-wide NMU collective bargaining agreement.

THIRTIETH: Notwithstanding the decision of the Board referred to in paragraph TWENTY-NINTH hereinabove, the NMU refused to comply with the order that it cease and desist from implementation of the Restraint-on-Transfer provisions of the industry-wide NMU collective bargaining agreement, and on or about October 10, 1973, the United States Court of Appeals for the Second Circuit upheld the determination of the Board and enforced the Board's order requiring the NMU to cease and desist from further implementation thereof.

THIRTY-FIRST: Sections 301 and 303 of the NLRA provide in pertinent part that whomever may be injured by the actions of a labor organization in breaching a collective bargaining agreement and/or in committing certain specified unfair labor practices may recover damages suffered by him plus the costs of suit from the labor organization.

THIRTY-SECOND: The aforesaid conduct by the NMU in forcing Commerce against its will to adhere to the provisions of the industry-wide collective bargaining agreement to which Commerce was not a signatory, constituted a breach of the NMU's agreement with Commerce and an unfair labor practice within the meaning of Sections 8(b)(4) and 8(e) of the Act, and such conduct was the direct causation of the damages, injuries and losses suffered by Commerce in connection with the sale of the Vessel BARBARA.

AS AND FOR ITS FOURTH
AMENDED COUNTERCLAIM

THIRTY-THIRD: This action arises under an Act of Congress dated July 2, 1908, 26 Stat. 209, as amended, 15 U.S.C. Section (1) et seq., entitled "an act to protect trade and commerce against unlawful restraints and monopolies", commonly known as the Sherman Act.

THIRTY-FOURTH: Defendant repeats and realleges each and every allegation contained in paragraphs FIRST through SEVENTEENTH, TWENTY-FIRST through TWENTY-THIRD and TWENTY-FIFTH hereof as if set forth in full herein.

THIRTY-FIFTH: The Restraint-on-Transfer provision of the NMU industry-wide collective bargaining agreement constituted an illegal contract in restraint of trade or commerce among the several states, or with foreign nations in that said provisions prevented and precluded the sale of the United States flag vessels by NMU contracted carriers to any party other than NMU contracted carriers and, therefore, thereby artificially depressed the fair value upon sale of any vessels operated by said NMU carriers and created illegal barriers to entry into the market for the transoceanic carriage of oil and grain cargoes.

THIRTY-SIXTH: The acts undertaken by the NMU in enforcing the Restraint-on-Transfer provisions of the industry-wide collective bargaining agreement against the will and over the objection of Commerce constituted a violation of the antitrust laws, in that the objective of such enforcement was to advance the institutional interests of the plaintiff as distinguished from the legitimate interests of the membership of the union.

AS AND FOR ITS FIFTH
AMENDED COUNTERCLAIM

THIRTY-SEVENTH: Defendant repeats and realleges each and every allegation contained in paragraphs FIRST through SEVENTEENTH, TWENTY-FIRST through TWENTY-THIRD, TWENTY-FIFTH, THIRTY-THIRD, THIRTY-FIFTH and THIRTY-SIXTH hereof, as if set forth in full herein.

THIRTY-EIGHTH: The Marine Engineers and Beneficial Association ("MEBA") is an association of supervisory personnel employed upon ocean-going vessels.

THIRTY-NINTH: The Masters Mates and Pilots Organization ("MMPO") is an association of supervisory personnel employed upon ocean going tankers.

FORTIETH: The American Radio Association ("ARA") is an association of professional personnel employed upon ocean tankers.

FORTY-FIRST: In or about December of 1968, representatives of the NMU, MEBA, MMPO and ARA met in Miami, Florida with a view to enter into and did thereafter enter into an understanding, the substance of which was that United States flag vessel operators contracted with each of the aforesaid associations would be required to agree to conditions in respect of the employees represented by each of said associations in the form and to the effect of the Restraint-on-Transfer provisions to the extent that the economic power of said associations acting in concert could require.

FORTY-SECOND: Upon information and belief, the Tanker Service Committee and the Maritime Service Committee are associations of employers engaged in the operation of United States flag vessels.

FORTY-THIRD: In and about July of 1969 representatives of the NMU met with representatives of the Tanker Service Committee and caused such Tankers Service Committee to agree upon and include in the industry-wide collective bargaining agreement the provisions referred to hereinbefore as the Restraint-on-Transfer clause.

FORTY-FOURTH: The Tanker Service Committee was illegally

and improperly induced to accept and agree to said Restraint-on-Transfer provisions by the prior and continuing demands for similar provisions which had been made by the MEBA, MMPO and ARA.

FORTY-FIFTH: The Tanker Service Committee was improperly and illegally induced to accept and agree to said Restraint-on-Transfer provisions by the willingness of the NMU to accept a system for the allocation of in excess of $44,000,000. of industry-wide pension contributions to the NMU, which system of allocation increased the amount payable by any one contracted party if any vessel theretofore operated by an NMU contracted party was sold or otherwise disposed of otherwise than to another NMU contracted party.

FORTY-SIXTH: Commerce was not at any time material hereto a member of the Tanker Service Committee, nor did it ever authorize the Tanker Service Committee to bargain on its behalf in respect of the agreement in general or the provisions of Article 1, Section 2 thereof in particular.

FORTY-SEVENTH: The extent and range of the NMU's monopoly power was such that at the conclusion of the negotiations with the Tanker Service Committee and the Maritime Service Committee, the NMU simply mailed the agreement to Commerce and other employers, which were forced to adopt and accept such collective bargaining agreement as a condition for continuing participation in the business of the trans-oceanic carriage of oil and grain cargoes by the operation of United States flag vessels.

FORTY-EIGHTH: The actions taken by the NMU in enforcing the Restraint-on-Transfer provisions of the industry-wide collective bargaining agreement were in furtherance of

the illegal understanding by and between the NMU; MEBA, MMPO 275a and ARA and in furtherance of the illegal agreement by and between the NMU and the Tanker Service Committee.

FORTY-NINTH: The actions taken by the NMU in enforcing the Restraint-on-Transfer provisions upon Commerce put into effect an implied agreement with the Tanker Service Committee and/or Maritime Service Committee to require non-members of such multi-employer associations to adhere to the collective bargaining provisions negotiated by said Committees, whose representatives actually knew that the practical effect of the promulgation thereof would be to restrain trade by preventing transfers of vessels by NMU contracted carriers to SIU contracted carriers.

FIFTIETH: The members of the Tanker Service Committee and the Maritime Service Committee, constituting the more powerful and dominant employers in the maritime industry, were the direct beneficiaries of the Restraint-on-Transfer provisions in that said clauses: (a) precluded the entry of new competition into the market for the carriage of oil and grain cargoes by United States flag vessels; (b) encouraged the transfer of NMU contracted vessels to foreign flag operators ineligible for the valuable trading privileges relating to the carriage of cargoes from one United States port to another United States port; and (c) in the absence of such transfer to parties ineligible to compete in the intra-United States ports markets, assured the employer members of the multi-employer bargaining associations that each NMU-contracted competitor would be required to adhere to the uniform pension contributions standards, all of which diminished and restrained

price competition among the employers engaged in the carriage of oil and grain cargoes between United States ports.

WHEREFORE, defendant, Commerce Tankers Corporation, demands judgment:

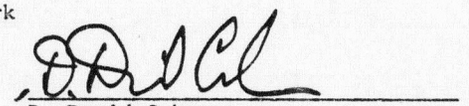
(a) dismissing the complaint;

(b) awarding to the defendant, Commerce, against the plaintiff, NMU, a judgment in monetary damages reimbursing and making Commerce whole for all losses, damages, injuries and expenses incurred by Commerce in connection with the sale of the Vessel BARBARA, in the amount of not less than $1,350,000., or as otherwise determined by this Court;

(c) awarding to the defendant Commerce, and against the plaintiff NMU, in respect of the alleged FOURTH and/or FIFTH counterclaims, a sum equal to threefold the losses, damages, injuries and expenses incurred by Commerce in connection with the sale of the BARBARA as determined by this Court; and

(d) awarding to defendant, Commerce, and against the plaintiff, NMU, the costs of suit, including a reasonable attorney's fee, and such other relief as the Court shall deem just and proper.

Dated: Great Neck, New York
April 4, 1974



D. David Cohen
Attorney for Commerce Tankers Corporation
175 Community Drive
Great Neck, N.Y. 11021
Tel.: (516) 487-0140

TO:

Law Offices of
Abraham E. Freedman, Esq.
Attorneys for National Maritime Union of America, AFL-CIO
346 West 17th Street
New York, N.Y. 10011

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500 Fifth Avenue
New York, N.Y. 10036

PLAINTIFF'S REPLY TO AMENDED COUNTERCLAIMS (71 CIV 582)
(Filed June 18, 1974)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

NATIONAL MARITIME UNION OF AMERICA, AFL-CIO, Plaintiff,	71 Civ. 582
-against-	Reply to Amended Counterclaim
COMMERCE TANKERS CORPORATION, Defendant,	
and	
VANTAGE STEAMSHIP CORPORATION, Intervening Defendant.	

Plaintiff, National Maritime Union of America, AFL-CIO, by its attorney, Abraham E. Freedman, in reply to the amended counterclaim filed by defendant, Commerce Tankers Corporation, states as follows:

REPLY TO FIRST AMENDED COUNTERCLAIM

1. Admitted.

2. Admits that prior to December, 1970 Commerce was the owner of two United States flag vessels engaged in interstate and foreign commerce. Plaintiff denies knowledge or information sufficient to form a belief as to the remaining allegations of Paragraph 2 and therefore denies same and demands proof thereof.

3. Denies knowledge or information sufficient to form a belief as to the allegations of Paragraph 3 of the counterclaim and therefore denies same and demands proof thereof.

4. Admits that at all times relevant hereto the unlicensed seamen employed upon the two United States flag vessels operated by defendant, Commerce, were represented for purposes of collective bargaining by the NMU. Except as so admitted herein, denies each and every allegation of Paragraph 4 of the counterclaim.

5. Denies knowledge or information sufficient to form a belief as to the allegations of Paragraph 5 of the counterclaim and therefore denies same and demands proof thereof.

6. Denies the allegations of Paragraph 6 of the counterclaim as stated. The relevant statutes are matters of public record and speak for themselves.

7. Denies each and every allegation of Paragraph 7 of the counterclaim.

8. Denies each and every allegation of Paragraph 8 of the counterclaim.

9. Denies each and every allegation of Paragraph 9 of the counterclaim as stated but admits the existence of a principle known as the "fleetwide principle", without admitting the interpretation thereof by counterclaimant. The applicable decisions relating to the "fleetwide principle" are matters of public record and speak for themselves.

10. Denies each and every allegation of Paragraph 10 of the counterclaim except that admits that effective June 6, 1969 the NMU extended its collective bargaining agreeements with various deep sea tanker and dry cargo vessel operators, and the provisions of said collective bargaining agreements speak for themselves.

11. Denies each and every allegation of Paragraph 11 of the counterclaim.

12. Denies knowledge or information sufficient to form a belief as to the allegations of Paragraph 12 of the counterclaim and therefore denies same and demands proof thereof.

13. Denies knowledge or information sufficient to form a belief as to the allegations of Paragraph 13 of the counterclaim and therefore denies same and demands proof thereof.

14. Denies each and every allegation of Paragraph 14 of the counterclaim.

15. Denies each and every allegation of Paragraph 15 of the counterclaim.

16. Denies each and every allegation of Paragraph 16 of the counterclaim except that it is admitted that an arbitration award was entered pursuant to the arbitration provisions of the collective bargaining agreement between plaintiff and Commerce, and said arbitration award speaks for itself.

17. Denies each and every allegation of Paragraph 17 of the counterclaim.

18. Denies each and every allegation of Paragraph 18 of the counterclaim except that it is admitted that a temporary restraining order and preliminary injunction were entered by the United States District Court for the Southern District of New York, the terms of which orders speak for themselves.

19. Denies each and every allegation of Paragraph 19 of the counterclaim.

20. Denies each and every allegation of Paragraph 20 of the counterclaim.

21. Denies each and every allegation of Paragraph 21 of the counterclaim except that it admits there was a decision of the United States Court of Appeals for the Second Circuit, the terms of which speaks for itself, said decision being rendered on the appeal of the Regional Director for the Second Region of the National Labor Relations Board.

22. Denies knowledge or information sufficient to form a belief as to the allegations of Paragraph 22 of the counterclaim and therefore denies same.

23. Denies any unlawful or improper interference by NMU in the business affairs of Commerce, and denies knowledge or information sufficient to form a belief as to the remaining allegations of Paragraph 23 of the counterclaim and therefore denies same and demands proof thereof.

REPLY TO
SECOND AMENDED COUNTERCLAIM

24. Plaintiff repeats and realleges its admissions and denials as set forth in Paragraphs 1 through 7, 12 through 17, and 21 through 23 hereof as if fully set forth herein at length.

25. Denies each and every allegation of Paragraph 25 of the counterclaim.

REPLY TO THIRD AMENDED COUNTERCLAIM

26. Denies each and every allegation of Paragraph 26 of the counterclaim.

27. Plaintiff repeats and realleges its admissions and denials as set forth in Paragraphs 1 through 7, 9 through 17, 21 through 23 and 25 hereof as if fully set forth herein at length.

28. Denies each and every allegation of Paragraph 28 of the counterclaim.

29. Admits the existence of the decision of the National Labor Relations Board referred to in the counterclaim and except as so admitted, denies each and every allegation of Paragraph 29 of the counterclaim.

30. Admits the decision of the United States Court of Appeals for the Second Circuit on the petition to enforce filed by the National Labor Relations Board, and except as so admitted, denies each and every allegation of Paragraph 30 of the counterclaim.

31. Admits the existence of Sections 301 and 303 of the National Labor Relations Act, the terms of which speak for themselves, and except as specifically admitted herein, denies each and every allegation of Paragraph 31 of the counterclaim.

32. Denies each and every allegation of Paragraph 32 of the counterclaim.

REPLY TO FOURTH AMENDED COUNTERCLAIM

33. Denies each and every allegation of Paragraph 33 of the counterclaim.

34. Plaintiff repeats and realleges its admissions and denials as set forth in Paragraphs 1 through 17, 21 through 23, and 25 hereof as if fully set forth herein at length.

35. Denies each and every allegation of Paragraph 35 of the counterclaim.

36. Denies each and every allegation of Paragraph 36 of the counterclaim.

REPLY TO FIFTH AMENDED COUNTERCLAIM

37. Plaintiff repeats and realleges its admissions and denials as set forth in Paragraphs 1 through 17, 21 through 23, 25, 33, 35 and 36 hereof as if fully set forth herein at length.

38. Denies knowledge or information sufficient to form a belief as to the allegations of Paragraph 38 of the counterclaim

and therefore denies same and demands proof thereof.

39. Denies knowledge or information sufficient to form a belief as to the allegations of Paragraph 39 of the counterclaim and therefore denies same and demands proof thereof.

40. Denies knowledge or information sufficient to form a belief as to the allegations of Paragraph 40 of the counterclaim and therefore denies same and demands proof thereof.

41. Denies each and every allegation of Paragraph 41 of the counterclaim.

42. Admitted.

43. Denies each and every allegation of Paragraph 43 of the counterclaim.

44. Denies each and every allegation of Paragraph 44 of the counterclaim.

45. Denies each and every allegation of Paragraph 45 of the counterclaim.

46. Denies knowledge or information sufficient to form a belief as to the allegations of Paragraph 46 of the counterclaim and therefore denies same and demands proof thereof.

47. Denies each and every allegation of Paragraph 47 of the counterclaim.

48. Denies each and every allegation of Paragraph 48 of the counterclaim.

49. Denies each and every allegation of Paragraph 49 of the counterclaim.

50. Denies each and every allegation of Paragraph 50 of the counterclaim.

FIRST SEPARATE DEFENSE TO AMENDED COUNTERCLAIM

51. The amended counterclaim, and each separate count thereof, fails to state a cause of action upon which relief can be granted.

SECOND SEPARATE DEFENSE TO AMENDED COUNTERCLAIM

52. The matters alleged in the amended counterclaim, and each separate count thereof, lie within the exclusive original jurisdiction of the National Labor Relations Board and, accordingly, are not within the jurisdiction of this Court.

THIRD SEPARATE DEFENSE TO AMENDED COUNTERCLAIM

53. The matters alleged in the amended counterclaim, and each separate count thereof, arise out of the collective bargaining agreement between plaintiff and defendant Commerce and, accordingly, defendant Commerce's sole and exclusive remedy is the grievance and arbitration procedure set forth in the collective bargaining agreement.

FOURTH SEPARATE DEFENSE TO AMENDED COUNTERCLAIM

54. The matters alleged in the amended counterclaim, and each separate count thereof, were the subject of an arbitration proceeding between plaintiff and Commerce, in which proceeding a decision was rendered. The decision of the arbitrator in the said proceeding is final and binding as to the rights of plaintiff and Commerce inter se.

FIFTH SEPARATE DEFENSE TO AMENDED COUNTERCLAIM

55. Defendant Commerce Tankers Corporation voluntarily entered into a collective bargaining agreement with the National Maritime Union containing the provision which became Article I, Section 2 thereof, dealing with the transfer of vessels. Having

voluntarily entered into said agreement, if said agreement was illegal, then defendant, Commerce, was a party thereto and cannot sue for damages based on such alleged illegality.

SIXTH SEPARATE DEFENSE TO AMENDED COUNTERCLAIM

56. Defendant Commerce was signatory to collective bargaining agreements with other maritime unions which contained provisions similar to Article I Section 2 of the collective bargaining agreement signed by Commerce with NMU. If said provision was illegal in the NMU collective bargaining agreement, it was also illegal in the collective bargaining agreements which Commerce signed with the other maritime unions and Commerce is barred from suing for damages based thereon because of its own illegal conduct and lack of "clean hands."

SEVENTH SEPARATE DEFENSE TO AMENDED COUNTERCLAIM

57. Defendant Commerce is barred from suing on the claims alleged in the amended counterclaim, and each count thereof, under the doctrine of estoppel.

EIGHTH SEPARATE DEFENSE TO AMENDED COUNTERCLAIM

58. The matters alleged in the amended counterclaim, and in particular the third count of the amended counterclaim, do not constitute a violation of Section 8(b)(4) of the National Labor Relations Act.

NINTH SEPARATE DEFENSE TO AMENDED COUNTERCLAIM

59. The National Labor Relations Act does not provide a civil remedy for damages for violations of Section 8(e) of the Act, and, therefore, there is no cause of action for violation of Section 8(e) as alleged in the Third Amended Counterclaim.

TENTH SEPARATE DEFENSE TO AMENDED COUNTERCLAIM

60. The actions of the plaintiff alleged in the counterclaim are exempt from the provisions of the Sherman Act by reason of the provisions of Section 6 of the Clayton Act, 15 U.S.C. Sec. 17, and therefore no cause of action lies against plaintiff for violations of the Sherman Act as alleged in the Fourth Amended Counterclaim and the Fifth Amended Counterclaim.

ELEVENTH SEPARATE DEFENSE TO AMENDED COUNTERCLAIM

61. None of the agreements or actions alleged in the counterclaim constitute unreasonable restraints of trade within the meaning of the anti-trust laws.

TWELFTH SEPARATE DEFENSE TO AMENDED COUNTERCLAIM

62. The counterclaim is barred by reason of the release of Commerce's claim and judgment against Vantage Steamship Corp. arising from the arbitration proceeding between them with respect to the sale of the S.S. Barbara.

THIRTEENTH SEPARATE DEFENSE TO AMENDED COUNTERCLAIM

63. The counterclaim is barred by the applicable statute of limitations.

FOURTEENTH SEPARATE DEFENSE TO AMENDED COUNTERCLAIM

64. The Court lacks jurisdiction over the subject matter of the counterclaim insofar as said counterclaim, or any of the counts thereof, are predicated on State law.

ABRAHAM E. FREEDMAN

By _____
Attorney for Plaintiff
346 West 17th Street
New York, New York 10011

TO: D. David Cohen, Esq.
175 Community Drive
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Attorney for Commerce Tankers Corp.

Surrey, Karasik, Morse & Seham
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Attorneys for Vantage Steamship Corp.

(Filed September 23, 1974)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

NATIONAL MARITIME UNION OF AMERICA, AFL-CIO,

Plaintiff,

- against -

COMMERCE TANKERS CORPORATION,

Defendant-Counterclaimant

and

VANTAGE STEAMSHIP CORP.,

Intervening Defendant.

71 Civ. 582 (TPG)

STIPULATED FINDINGS OF FACT

VANTAGE STEAMSHIP CORP.,

Plaintiff,

- against -

NATIONAL MARITIME UNION OF AMERICA, AFL-CIO,

Defendant.

72 Civ. 4619 (TPG)

STIPULATION

IT IS HEREBY STIPULATED AND AGREED, by and between counsel for each of the undersigned parties, that the Findings of Fact (Paragraphs 1 - 45 inclusive) set forth hereinafter be admitted for purposes of the trial of the pending actions only. Each matter admitted pursuant to this Stipulation shall be deemed to be conclusively established unless the Court, on motion, shall

permit withdrawal or amendment of the Stipulation. Withdrawal or amendment of any paragraph hereof shall not affect any other paragraph. No party shall be precluded hereby from introducing such evidence as might otherwise be admissible pursuant to Rule 43 of the Federal Rules of Civil Procedure.

Dated: New York, New York
September 16, 1974

NATIONAL MARITIME UNION OF
AMERICA, AFL-CIO

By _____

Abraham E. Freedman, Esq.
346 West 17th Street
New York, New York 10011

COMMERCE TANKERS CORPORATION

By _____

D. David Cohen, Esq.
175 Community Drive
Great Neck, New York 11021

VANTAGE STEAMSHIP CORP.

By _____

Surrey, Karasik, Morse
& Seham, Esqs.
500 Fifth Avenue
New York, New York 10036

STIPULATED FINDINGS OF FACT

1. Prior to January 1, 1969, Commerce Tankers Corporation (hereafter "Commerce") was the owner and operator of two oceangoing tanker vessels, the S.S. Thalia and the S.S. Barbara. It had collective bargaining agreements covering the crew members employed aboard these vessels as follows: with the National Maritime Union of America ("NMU") covering the unlicensed seamen; with the Marine Engineers Beneficial Association District No. 1 ("MEBA") covering the licensed engineers; with the International Organization of Masters, Mates and Pilots ("MMP") covering the licensed deck officers, and with the Radio Officers Union ("ROU") covering its radio officers.

2. Prior to 1969 and continuing thereafter, some, but not all, NMU-contracted carriers operating vessels engaged in the carriage of bulk liquids belonged to a multi-employer bargaining association known as the Tanker Service Committee ("TSC"). Prior to 1969 and continuing thereafter, some, but not all, NMU-contracted carriers operating vessels in the carriage of dry cargo belonged to a separate multi-employer bargaining association known as the Maritime Service Committee ("MSC").

3. At all times material herein, Commerce was a corporation owning and operating United States flag vessels engaged in the transportation of various goods and commodities in interstate and foreign commerce.

4. At all times material herein, Vantage Steamship Corporation ("Vantage") was a New York corporation owning and operating United States flag vessels engaged in the transportation of various goods and commodities in interstate and foreign commerce.

5. At all times material herein, Vantage recognized the Seafarers International Union ("SIU") as the collective bargaining representative of its unlicensed crew members.

6. At all times material herein, Vantage had collective bargaining agreements covering its other crew members with: the MEBA for its engineers; the MMP for its licensed deck officers; and the ROU for its radio officers.

7. The employment of seamen in the organized maritime industry is largely on a hiring hall basis. The NMU and the SIU each have separate hiring halls for unlicensed personnel.

8. During the year 1968, the MEBA had entered into an agreement with the operators of certain seagoing freighter vessels, the substance of which required that the operators give the MEBA notice of any impending sale or transfer of a vessel and that the shipowner obtain from the transferee of the vessel an agreement to continue to apply the MEBA contract to said vessel.

9. On March 28, 1969, the NMU sent a letter to all the oceangoing ship operators with which it had collective bargaining agreements, including Commerce, giving notice of its intention to open negotiations for renewal of its collective bargaining

agreements with them which were scheduled to expire on June 15, 1969. An initial meeting was held at the Barbizon Plaza Hotel in New York on April 2, 1969, at which representatives of the ship operators were present, as well as representatives of the NMU, the MEBA and the MMP.

10. The negotiations with respect to the NMU contract continued during April, May and June of 1969. Agreement was reached on some, but not all, of the provisions for a new collective bargaining agreement. Since the collective bargaining agreement then in effect was scheduled to expire at midnight June 15, 1969, an agreement incorporating some of the provisions which had been agreed upon and extending the existing collective bargaining agreement as to other items, with notice that negotiations would continue past the expiration date as to certain matters, was prepared and sent to the various NMU contract companies. Commerce signed this extension agreement. During the entire period involved there was no interruption in the operation of Commerce's vessels by seamen represented by the NMU.

11. Commerce was not a member of the TSC or the MSC.

12. In the course of the negotiations leading up to the extension agreement, one of the proposals submitted by the NMU was the adoption of a provision similar to that which the MEBA already had obtained with certain freighter operators with respect to the sale and transfer of vessels.

13. The following contract language was agreed upon subsequent to June 15, 1969 and was thereupon incorporated in the collective bargaining agreement between the NMU and its deep sea tanker and dry cargo vessel operators as Article I, Section 2 thereof:

> "Sale and Transfer of Vessels. (a) The Company agrees with respect to any vessel which is presently under or may hereafter come under this Agreement, that if during the term of this Agreement said vessel is sold or transferred in any manner to any other business entity not covered by this Agreement for operation under United States flag (but not including a vessel which the Company bareboat charters and the charter is terminated), said vessel shall be sold or transferred with the complement of employees who either are or shall be provided by the Union in accordance with the terms of this Agreement, or such number as may be agreed upon between the Union and the transferee. The term "transfer" shall be construed to include any chartering of a vessel by the Company.
>
> "(b) The Company obligates itself to obtain for the benefit of the Union a written undertaking with the Union to be executed by the business entity to which the vessel has been sold or transferred that for the full term of the Agreement all of its terms and provisions shall apply to said vessel except as hereinabove provided and that said business entity will fully comply with all of the terms and provisions of the Agreement and any amendments thereto to preserve the jobs and job rights of the Unlicensed Personnel covered by this Agreement and to protect and maintain the wages, pension rights and other economic benefits and working conditions provided such personnel under this Agreement.
>
> "(c) The Company agrees that if it desires to sell, bareboat charter or in any manner whatsoever transfer a vessel to another business entity, whether for United States-flag or foreign-flag registry, timely written notice to the Union must first be given prior to any such sale or transfer.

> "(d) This Section shall be deemed of the essence of the Collective Bargaining Agreement and in the event of any violation, the no-strike provisions of this Agreement shall not be applicable."

The contract was printed in booklet form and copies were distributed to Commerce and others in or about February 1970.

15. During the same period that the NMU was negotiating for the renewal of its collective bargaining agreements with its contract companies, the MEBA and the MMP also were negotiating for renewal of their contracts. In the course of negotiations conducted by these unions, each of them requested their contract companies to incorporate into their contracts a provision dealing with the sale and transfer of vessels outside the bargaining unit during the term of the contract.

16. Some time prior to December 1968, the principal stockholder of Commerce, Milton Pilalas, had sold his stock in Commerce to Vernitron Corporation ("Vernitron") in exchange for Vernitron stock. However, Pilalas continued on as the principal operating officer of Commerce.

17. Some time during the year 1970, the principals of Vernitron determined that they wished to sell Commerce's two vessels, the S.S. Barbara and the S.S. Thalia. The negotiations for these sales were handled in part by the brokerage firm of Blix, Mallory & Co., Inc. In December 1970, Commerce arrived at an agreement to sell the S.S. Thalia owned by it to Texas City Refining, Inc., a company which at the time had a collective bargaining agreement with the NMU.

18. Some time prior to December 1970, Vantage became interested in purchasing the S.S. Barbara.

19. On December 23, 1970, Commerce, as seller, and Vantage, as buyer, entered into a Contract of Sale with respect to the S.S. Barbara, a copy of which is annexed hereto as Exhibit "A".

20. Thereafter, Vernitron issued a release announcing the sale by Commerce of its two vessels, and a published report thereof appeared in, among other publications, the Journal of Commerce on December 30, 1970.

21. Neither Commerce nor Vernitron gave any written notice to the NMU of the proposed sale of the S.S. Barbara to Vantage and in early January 1971, the NMU learned of the impending sale of the vessel through trade publications. Upon learning of the proposed sale, the NMU wrote to Commerce as follows:

January 11, 1971

Mr. Milton Pilalas, President
Commerce Tankers Corp.
c/o Empire Ship Agents & Brokers, Inc.
500 Fifth Avenue
New York, New York 10036

Gentlemen:

It has come to our attention that you are contemplating the sale of the S/S BARBARA to another American-flag Steamship Company.

Your attention is directed to Article I, Section 2 of the Collective Bargaining Agreement which requires that you obtain from the purchasing company, as a condition of any such sale, an agreement that the Collective Bargaining Agreement shall continue to apply to the vessel.

Please advise at once by return mail whether you are in fact contemplating the sale of the vessel, if so to whom and what steps you are taking in compliance with the Collective Bargaining Agreement.

Very truly yours,

Mel Barisic
Vice President

22. In response to the foregoing letter, the NMU received a reply from Milton Pilalas as follows:

January 13, 1971

Mr. Mel Barisic, Vice President
National Maritime Union of America
36 Seventh Avenue
New York, New York 10011

Dear Mr. Barisic:

In reply to your letter of January 11, 1971 addressed to me as President of Commerce Tankers Corporation, I wish to advise that our tanker "THALIA" was sold and delivered to Texas City Refining, Inc. on December 23, 1970, and further, that a Contract of Sale has been entered into for the "BARBARA" to the Vantage SS Corporation for delivery scheduled sometime in February.

Commerce Tankers Corporation is a wholly-owned subsidiary of Vernitron Corporation, and the final negotiations for the sale of these vessels were made directly between Vernitron Corporation and the buyers through the brokerage firm of Blix-Mallory & Company. For your guidance, at the start of negotiations for the sale of these vessels I advised Mr. Blix of Blix-Mallory & Company that the same unions, including NMU, with which Commerce Tankers Corporation had collective bargaining agreements must continue to man the vessels after their sale, and that this was to be made a condition of the sale; and he assured me that this was fully understood and would be impressed on prospective buyers. I know that the same unions are continuing on the THALIA and have no reason to believe that it will be otherwise with the BARBARA.

Very truly yours,

COMMERCE TANKERS CORPORATION

Milton Pilalas
President

23. After receipt of the foregoing letter from Milton Pilalas, the NMU contacted Vantage but was unable to obtain assurance that an NMU crew would be continued on the S.S. Barbara.

24. The NMU demanded arbitration with Commerce under the arbitration provisions of the collective bargaining agreement with respect to whether Commerce was violating Article I, Section 2 of the collective bargaining agreement by the manner in which it was transferring the vessel.

25. An arbitration was held on February 8, 1971 before Theodore W. Kheel, Esq. as arbitrator. The arbitration was attended by D. David Cohen, Esq. and Kenneth Simon, Esq.

on behalf of Commerce, and by Charles Sovel, Esq. and Ned R. Phillips, Esq. on behalf of the NMU. Vantage was not a participant in the arbitration.

26. On February 8, 1971, Arbitrator Kheel issued a decision in which he directed that Commerce not transfer the S.S. Barbara to Vantage or any other purchaser without first complying with Article I, Section 2 of the collective bargaining agreement between Commerce and the NMU.

27. On February 9, 1971, the NMU instituted suit against Commerce in the United States District Court for the Southern District of New York to obtain enforcement of Arbitrator Kheel's award, and a temporary restraining order was issued in conformity with Arbitrator Kheel's order. This temporary restraining order was signed on February 9, 1971 by Judge Inzer B. Wyatt, who set February 23, 1971 as the date for a hearing on whether a preliminary injunction should be issued.

28. Thereafter, on February 16, 1971, Vantage moved to intervene in the action as a defendant and a motion was made before Judge Wyatt to vacate the temporary restraining order. Argument on this motion to vacate the temporary restraining order was heard by Judge Wyatt on February 18, 1971. On February 19, 1971, Judge Wyatt filed a Memorandum in which he directed the dissolving of the temporary restraining order upon the fulfillment of certain conditions, as set forth in an order signed on February 22, 1971.

29. On February 23, 1971, the matter came on to be heard before the Honorable Marvin E. Frankel. After oral argument, Judge Frankel determined to reinstate the temporary restraining order until he could render a decision on the matters before him.

30. On March 4, 1971, Judge Frankel entered an order granting a preliminary injunction restraining the transfer of the S.S. Barbara without compliance with Article I, Section 2 of the collective bargaining agreement between Commerce and the NMU.

31. In late March, 1971, representatives of Commerce had a meeting with representatives of the NMU which will be the subject of testimony at trial. Present on behalf of Commerce were Herman S. Nathanson, President of Vernitron, and D. David Cohen, counsel. Present on behalf of the NMU were Shannon Wall, the Secretary-Treasurer of the NMU, Mel Barisic, the Vice-President of the NMU, and Charles Sovel, attorney for the NMU, (who came into the meeting after it had begun).

32. In the interim period, on or about February 16, 1971, Vantage filed unfair labor practice charges with the Regional Director of the National Labor Relations Board for the Second Region charging the NMU and Commerce with engaging in unfair labor practices in violation of Sections 8(a)(1), (2) and (3), 8(b)(4), and 8(e) of the National Labor Relations Act ("the Act"). The Regional Director conducted an investigation of these charges and ultimately determined to issue a complaint

against both the NMU and Commerce alleging a violation of Section 8(e) of the Act.

33. In compliance with the provisions of Section 10(l) of the Act, the Regional Director then sought a preliminary injunction against the NMU and Commerce in the United States District Court for the Southern District of New York to enjoin them from enforcing or giving effect to Article I, Section 2 of their collective bargaining agreement. This application for an injunction under Section 10(l) of the Act was heard on June 4, 1971 by the Honorable Thomas F. Croake. Following the filing of the petition for Section 10(l) injunction, Commerce moved to vacate the injunction issued by Judge Frankel on grounds of change in circumstances. This motion was combined with the proceeding before Judge Croake, who, by decisions dated June 22, 1971 and July 15, 1971, denied the relief being sought. See 329 F.Supp. 151.

34. By decision dated March 22, 1972, the Court of Appeals for the Second Circuit reversed Judge Croake's decision denying the Section 10(l) injunction sought by the Regional Director for the National Labor Relations Board, directed the granting of the Section 10(l) injunction and vacated the preliminary injunction entered by Judge Frankel. See 457 F.2d 1127.

35. While the foregoing appeals were under consideration by the Court of Appeals, the National Labor Relations Board proceeded with the determination of the Section 8(e) unfair labor practice charge on which it had issued a complaint against both

Commerce and the NMU. This aspect of the case came on for hearing before Trial Examiner Thomas F. Ricci who filed a decision finding that Article I, Section 2 was not in violation of Section 8(e) of the Act.

36. The case was then transmitted to the National Labor Relations Board in Washington for decision. By decision dated May 16, 1972, the Board reversed the decision of Trial Examiner Ricci and held that both Commerce and the NMU were guilty of violating Section 8(e) of the Act.

37. Commerce then acquiesced in the Board's decision.

38. The NLRB then petitioned the United States Court of Appeals for the Second Circuit to enforce against the NMU its order finding that Article I, Section 2 was in violation of Section 8(e) of the Act. The Court of Appeals enforced the Board's decision, see 486 F.2d 907, and the United States Supreme Court denied NMU's Petition for a Writ of Certorari.

39. In addition to the foregoing litigation involving the NMU, there was separate litigation between Commerce and Vantage. Commerce asserted a claim against Vantage in a commercial arbitration alleging that Vantage had violated the provisions of the contract between them for the sale of the S.S. Barbara. In this commercial arbitration, Commerce contended, inter alia, that Vantage had agreed to take care of any labor dispute which might arise from the sale of the vessel and, by such agreement, bore the risk of loss if such a dispute prevented the transfer of the vessel. Vantage, in turn, denied that it had made any such agreement with Commerce, and filed a separate claim in the arbitration proceeding against Commerce claiming damages in excess of Two Million Dollars ($2,000,000.00).

40. After an arbitration hearing in which considerable testimony was taken, on July 9, 1971 the arbitrators, by a vote of 2 to 1, found in favor of Commerce and against Vantage, and awarded Commerce damages measured by the full amount of the contract purchase price for the S.S. Barbara, which was Two Million, Seven Hundred Fifty Thousand Dollars ($2,750,000.00), plus other damages in the amount of One Hundred Thirty-Three Thousand Two Hundred Sixty-Four Dollars and Ten Cents ($133,264.10), less the net proceeds realized upon the sale of the S.S. Barbara, with the sale of the vessel being directed pursuant to the provisions of Section 2-706 of the Uniform Commercial Code. Vantage's claim against Commerce was denied.

41. Application was then made to the Supreme Court of the State of New York to confirm the commercial arbitration award. This was litigated and resulted in a decision by Judge Abraham J. Gellinoff dated November 20, 1972 confirming the award. Judge Gellinoff's decision subsequently was affirmed by split decision of the Appellate Division, First Department in a decision dated April 5, 1973. See 41 A.D. 2d 813, 342 N.Y.S. 2d 281. Vantage obtained a stay of enforcement of the judgment and appealed to the Court of Appeals of the State of New York.

42. On or about October 30, 1972, Vantage instituted suit against the NMU and Commerce alleging various violations of the anti-trust laws and other statutes and common law.

43. On or about May 31, 1973 while Vantage's appeal to the Court of Appeals was pending, Commerce and Vantage entered into an agreement to terminate all the litigation between them. This agreement provided, inter alia, that Vantage was to pay